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Supreme Court Of The United States

October Term, 1996

STUDENT LOAN MARKETING ASSOCIATION,
Petitioner,

vs.

RICHARD W. RILEY,
Secretary of the United States Department of Education,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the statutory imposition of a fee solely on the assets of a privately owned and publicly traded corporation, based upon its ranking as the largest service provider of its kind in a federally sponsored program, violates the Takings Clause of the Fifth Amendment to the Constitution.

2. Whether singling out one privately owned and publicly traded corporation for the imposition of a statutory fee, based upon the corporation's status as a federally chartered entity, violates the Takings Clause of the Fifth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

Petitioner Student Loan Marketing Association was the plaintiff in the district court and appellant/cross-appellee in the court of appeals. Petitioner has no parent corporation and holds interests in the following nonwholly owned subsidiaries: Academic Capital, L.L.C.; Education First Finance, L.L.C.; Education First Marketing, L.L.C.; MaeFirst Financial Corporation; MaeFirst Leasing Corporation; SIS Development, L.L.C.; and College Construction Loan Insurance Association. Respondent Richard W. Riley, Secretary of the United States Department of Education, was the defendant in the district court and appellee/cross-appellant in the court of appeals.

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No. _____

IN THE

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STUDENT LOAN MARKETING ASSOCIATION,
Petitioner,

vs.

RICHARD W. RILEY,
Secretary of the United States Department of Education,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Student Loan Marketing Association respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 10, 1997.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 104 F.3d 397. The opinion of the district court (Pet. App. 26) is reported at 907 F. Supp. 464.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 10, 1997. A petition for rehearing to clarify the court of appeals' ruling was filed on February 24, 1997. The petition was

granted on March 11, 1997, and the mandate of the court of appeals issued on March 27, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. amend. V
20 U.S.C. § 1081 (1994)
20 U.S.C. § 1087-2 (1994)

These provisions are set forth at pages 49-81 of the Petitioner's Appendix.

STATEMENT OF THE CASE

A. The Role Of Sallie Mae In The Student Loan Program.

The Student Loan Marketing Association ("Sallie Mae") is a federally chartered, for profit corporation that is publicly traded and privately financed. Congress established Sallie Mae in 1972 through the Higher Education Act ("HEA"), 20 U.S.C. § 1087-2 (1994), as a "private corporation . . . financed by private capital," to provide a national secondary market for federally sponsored student loans originated by others under the Federal Family Education Loan Program ("FFELP") (formerly the Guaranteed Student Loan Program). Sallie Mae's federal charter restricts the scope of its activities to acquiring and holding post-secondary student loans and to other specified educational goals in furtherance of the HEA. *Id.* § 1087-2(d). By attracting, managing, and deploying private capital pursuant to its charter, Sallie Mae has provided liquidity that has been essential to the establishment and maintenance of a national secondary market for student loans.

Sallie Mae is one of four privately owned, publicly traded corporations operating under a federal charter known as Government Sponsored Enterprises ("GSEs").[1] Like other GSEs, Sallie Mae is not an agency of the federal government or a government corporation or program. *See* 31 U.S.C. § 9101 (1994). Sallie Mae does not receive any appropriated funds. It raises funds for its operations primarily through the sale of corporate debt securities that are not guaranteed by the federal government. All business risks associated with Sallie

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[1] The other publicly traded GSEs are the Federal National Mortgage Association ("Fannie Mae"), 12 U.S.C. § 1717 (1994), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), 12 U.S.C. § 1452 (1994), and the Federal Agricultural Mortgage Corporation ("Farmer Mac"), 12 U.S.C. § 2279aa-1 (1994). In addition, there are a number of GSEs whose shares are not publicly traded.

Mae's operations are thus borne by its shareholders and not the federal government or taxpayers. Sallie Mae is subject to federal income taxation, and has paid more than $1 billion in such taxes since its creation.

To acquire FFELP loans, Sallie Mae competes with dozens of other participants in the secondary student loan market -- primarily non-profit and state related entities that fund the bulk of their portfolios on a tax exempt basis, and banks that rely in part for their funding upon federally insured deposits. Sallie Mae is the holder of approximately 33% of all outstanding FFELP loans.[2] As such, it is the largest single participant in the secondary market for such loans, but does not hold the majority of such loans.

FFELP loans are substantially (98%) guaranteed by state and non-profit guarantee agencies, which in turn are reinsured by the federal government. 20 U.S.C. § 1081 (1994) (Pet. App. 50). Sallie Mae's rights under these guarantees do not differ from those of any other holder of FFELP loans.

B. The Imposition Of The Fee On Loans Held By Sallie Mae.

In 1993, as part of an effort to reduce the federal budget deficit, Congress included in the Omnibus Budget Reconciliation Act a provision requiring Sallie Mae to pay "an offset fee calculated on an annual basis in an amount equal to 0.30 percent [30 basis points] of the principal amount of each loan made, insured or guaranteed under [the FFELP] that [Sallie Mae] holds . . . and that was acquired on or after August 10, 1993." 20 U.S.C. § 1087-2(h)(7)(A) (the "Act") (Pet. App. 64). The Act specifies that this 30 basis point fee shall be paid, by Sallie Mae alone, into an insurance fund to

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[2] U.S. DEP'T. OF EDUC., OFFICE OF POSTSECONDARY EDUC., FY 1993 LOAN PROGRAMS DATA BOOK at 52.

support the guarantee of student loans under the FFELP. *See* 20 U.S.C. §§ 1087-2(h)(7)(C), 1081. The insurance fund is an accounting mechanism that does not in any way limit the obligation of the United States to pay claims by the guarantee agencies with respect to defaulted FFELP loans.

The Act imposes the 30 basis point fee only upon Sallie Mae. It does not apply to any other participant in the secondary market for student loans, or to any other FFELP participant, or to any other GSE. The Act confers no benefits upon Sallie Mae to reciprocate for the imposition of the fee.

The only reason articulated by Congress for the fee provision was a desire to meet federal budget deficit reduction targets specified in the Concurrent Resolution on the Budget for fiscal year 1994. The fee was an acknowledged response to the directive of the Conference Report on the Budget Resolution to the House Committee on Education to "recommend changes in laws within its jurisdiction sufficient to reduce direct spending by $5.817 billion over the period of fiscal years 1994 through 1998," so as to ensure compliance with deficit reduction goals. H.R. REP. No. 103-111 at 105 (1993); *see also* H.R. Con. Res. 64, 103d Cong. § 12(a) (1993); 139 CONG. REC. H1747, H1753 (daily ed. Mar. 31, 1993).

Sallie Mae has been paying the 30 basis point fee in monthly installments on loans purchased since the effective date of the Act. To date, Sallie Mae has paid over $100 million in such fees to the United States Treasury. The amount of the payments and the percentage of Sallie Mae's portfolio subject to the fee will continue to rise as Sallie Mae purchases additional student loans. Sallie Mae estimates that the aggregate amount of fees due over the life of the loan portfolio purchased from 1994 through 1998 alone will amount to hundreds of millions of dollars.

C. The Proceedings Below With Respect To The Constitutionality Of The Fee.

Sallie Mae commenced an action against the Secretary of Education (the "Secretary") in the United States District Court for the District of Columbia, seeking a declaratory judgment, *inter alia*, that the fee provision represented an uncompensated taking of property in violation of the Takings Clause of the Fifth Amendment.[3] The parties cross-moved for summary judgment.[4]

On November 16, 1995, United States District Court Judge Stanley Sporkin issued a Memorandum Opinion holding that the Act was constitutional on its face. Pet. App. 26-47. Relying on *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), the district court stated that

> the fee shifts some of the burden of insuring student loans from the general Treasury, and ultimately the American taxpayer, to the government entity which most directly benefits from the insurance fund. As such, the fee adjusts burdens and benefits for the common good and is proper governmental action.

Pet. App. 35-36.[5] The district court also stated that "benefits Sallie Mae has received and continues to receive from the government" as a consequence of its status as a GSE justified the imposition of the fee. Pet. App. 36.

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[3] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[4] Other aspects of the action below are not germane to this Petition.

[5] In so holding, the district court erroneously characterized Sallie Mae as a "government entity," and as a "federally created and regulated *program*." Pet. App. 35, 37 (emphasis added).

Sallie Mae appealed the district court's ruling that the fee provision was not an unconstitutional taking.[6] Although the court of appeals rejected certain aspects of the trial court's reasoning, it affirmed the constitutionality of the fee based upon (i) Sallie Mae's role in the FFELP as the largest single holder of guaranteed student loans, and (ii) Sallie Mae's status as a GSE.

In considering Sallie Mae's role in the FFELP, the appellate court recognized that the benefits of the program were rather "widely distributed" among student borrowers, institutions of higher education, and numerous private and state lending institutions, as well as participants in the "artificially generated" secondary market for FFELP loans. Pet. App. 7. Nonetheless, it found that

> [a]s the largest player in this artificially generated market, Sallie Mae is a -- perhaps the -- prime beneficiary of the loan guarantee fund that the offset fee helps underwrite.

Pet. App. 7-8.

The court of appeals also determined that three attributes of GSE status constitute governmentally conferred benefits that compensate Sallie Mae for the burden of the fee. "The most telling of these," the court stated, "is probably the statutory exemption from state and local tax liability." Pet. App. 10. State and local governments constitutionally are powerless to tax congressionally chartered corporations, such as Sallie Mae. *Osborn v. President of the Bank of United States*, 22 U.S. (9 Wheat.) 738, 865 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425, 431 (1819). This protection, which arises from the Supremacy Clause of the Constitution, is affirmed in Sallie Mae's charter. 20 U.S.C. § 1087-2(b)(2).

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[6] The Secretary cross-appealed aspects of the district court's judgment unrelated to the constitutional issue that is the subject of this Petition.

The court of appeals acknowledged Sallie Mae's position that it would be immune from such taxation under the Supremacy Clause even absent such a statutory exemption. Pet. App. 10. But the court concluded the charter provision had value because it eliminated any need for Sallie Mae to litigate the issue and "any risk that it might be found not to qualify;" and because Congress in any event could waive that immunity "by enacting a clear statement to that effect." Pet. App. 10.

The court of appeals also stated that two other benefits "appear material." Pet. App. 10. One of these was Sallie Mae's exemption from the registration requirements of the Securities and Exchange Commission ("SEC"). *See* 20 U.S.C. § 1087-2(l). This was said to save Sallie Mae legal and accounting fees, and to "crystallize[] Sallie Mae's special relationship to the market for student loans." Pet. App. 10.

The other attribute of GSE status identified as material by the court was Sallie Mae's access to low-cost federal borrowing. Sallie Mae has the authority to borrow funds from the Federal Finance Bank ("FFB"), 20 U.S.C. § 1087-2(h)(6), but has not done so with the exception of seed money loans over a decade ago that the court recognized had been fully repaid in accordance with their terms. Pet. App. 8-9, 10. The court found that the seed loans were "pure history" that could not now be used to justify the imposition of the fee; and that Sallie Mae's "non-use" of further FFB borrowing "suggests its value is limited." Pet. App. 8, 10. But the court said that Sallie Mae's access to such borrowing, albeit "ill-defined," "may provide a marginal reduction in the risk of future insolvency." Pet. App. 10.

The court of appeals observed that "Sallie Mae's various advantages [as a GSE] are hard to quantify." Pet. App. 10. The court also stated that limits must be imposed "on the possible manipulation of benefits and burdens to prevent the unfair singling out that the takings clause is in part aimed to prevent." Pet. App. 11. Still, the court concluded that there

was a "rough equivalency" between the advantages it found to have been conferred upon Sallie Mae by the HEA and the imposition of the fee. Pet. App. 10.

REASONS FOR GRANTING THE PETITION

This case presents an important question of constitutional law that was wrongly decided by the court of appeals and should be settled by this Court. The decision below permits Congress to single out, by name, the largest privately owned provider of services to any governmental program for the imposition of a fee, in violation of takings law doctrine enunciated by this Court. As a consequence, Sallie Mae and its shareholders are divested of hundreds of millions of dollars in order to subsidize the FFELP and reduce the federal budget deficit -- burdens that instead should be borne by the public as a whole.

In ruling that Sallie Mae's GSE status justifies the imposition of a fee, the court of appeals has stripped all federally chartered corporations of Takings Clause protection. The court's basis for that ruling -- that Congress has refrained from waiving the immunity from state and local taxes that Sallie Mae, as a federally chartered corporation, receives under the Supremacy Clause -- effectively sanctions the unconstitutional diversion of state and local revenues to the federal Treasury.

A. The Decision Below Permits Congress To Single Out The Largest Service Provider In Any Government Program For The Imposition Of A Fee, In Violation Of Takings Law Doctrine Enunciated By This Court.

The decision of the court below rests upon the unprecedented notion that a publicly traded corporation's ranking as the "largest player" among the many service providers in a governmental program justifies the imposition of a fee solely on the assets of that corporation. To single out one provider

of services to such a program for a special assessment in order to reduce the impact of that program on the federal budget is directly at odds with the bedrock principle of the Takings Clause that the government cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

While Congress has a measure of discretion in apportioning economic burdens for the public good, it may not do so in a manner that is arbitrary and irrational. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976); *Connolly*, 475 U.S. at 228 (O'Connor, J., concurring). The fee here is irrational and arbitrary because Sallie Mae's status as the single largest service provider in the FFELP does not correlate to any factor that justifies singling out Sallie Mae, from among all of the participants in the program, to suffer the unique burden of the 30 basis point fee. The fee thus fails to satisfy this Court's precept that government enactments that burden property for the general public welfare must, at a minimum, be applicable to all similarly situated property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023 (1992) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 n.30 (1978)); *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992).

As the court of appeals found, the most tangible benefits that flow from the FFELP are "widely distributed" among student borrowers, institutions of higher education and numerous private and state lending institutions, as well as participants in the secondary market for FFELP loans. Pet App. 7. The FFELP was enacted to honor a "national commitment to offer every child the fullest possible educational opportunity," much as any number of other federally sponsored programs advance various broad public goals. S. REP. 89-673, at 42 (1965), *reprinted in* 1965 U.S.C.C.A.N. 4027, 4060

(quoting testimony of Commissioner of Education). The FFELP accomplishes this by making "long-term credit for educational purposes available to every qualified college student in the Nation." *Id.* Student borrowers are thus the immediate beneficiaries of the guarantee, which induces lenders to make or hold uncollateralized loans to otherwise uncreditworthy borrowers.

More importantly, Sallie Mae does not benefit from the federal guarantee any more than any other holder of FFELP loans. Nor does Sallie Mae reap the majority of any benefits associated with the guarantee. Although it is the largest single participant in the secondary loan market, other participants -- including banks as well as non-profits and state agencies -- together hold 67% of FFELP loans. Moreover, Sallie Mae does not originate such loans; it simply purchases previously guaranteed loans, which does nothing to increase the government's risk under the guarantee. Nor is there any evidence that Sallie Mae experiences a higher default rate with respect to guaranteed FFELP loans than any other holder of such loans. Thus, any risk associated with a loan acquired by Sallie Mae is present from the outset, and is not exacerbated by the acquisition.

The singling out of Sallie Mae by name also belies any *post hoc* rationale that the fee is intended to compensate the government for the benefits emanating from the existence of the federal loan guarantee. As discussed above, all holders of FFELP loans stand on equal footing with respect to the guarantee. Indeed, were Sallie Mae to be eclipsed in its ranking as the largest of those holders, it nonetheless would continue to be the only holder obligated to pay the fee. In these circumstances, the express designation of Sallie Mae as a class of one effectuates "the bare transfer of private property" to the government in violation of the Takings Clause. *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.8 (1989) (citing *Webb's*

Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980)).[7]

If the holding below is allowed to stand, it will invite enactment of equally arbitrary and irrational statutes with respect to other government programs. To illustrate, the rationale offered by the court of appeals would permit Congress to single out the largest provider of health care services reimbursable under the Medicare program[8] for the imposition of a fee to defray the cost of that program, on the theory that the medicare provider "is a -- perhaps the -- prime beneficiary" of the insurance payments that such a fee would help to underwrite. Pet. App. 7-8. Similarly, a fee could be imposed upon the largest owner and operator of rental housing subsidized under Section 8 of the United States Housing Act of 1937, as amended,[9] on the theory that the housing provider "is a -- perhaps the -- prime beneficiary" of the federal rent subsidies that such a fee would support.

Medicare, Section 8, and a myriad of other federal programs are similar to the FFELP in that they may "artificially" generate a market for services provided by private sector entities. Pet. App. 7. But there is no authority for the proposition,

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[7] In asserting that the fee is justified by the implicit benefits that emanate to Sallie Mae from the federal loan guarantee, the Secretary and the court below rely on *Sperry* and other cases upholding users' fees. Even if the fee here could somehow be considered akin to a users' fee, the fact that it is imposed on Sallie Mae alone distinguishes it from the fee upheld in *Sperry*. There, the users' fee was applicable to all parties who benefitted from the existence of the Iran-United States Claims Tribunal -- not just one, singled out by name.

[8] 42 U.S.C. § 1395 (1994). Medicare is the federal health insurance program for the elderly and disabled.

[9] 42 U.S.C. § 1437(f) (1994). Section 8 is the federal program that provides rent subsidies for low and moderate income families and individuals.

advanced by the court of appeals, that compensation received by such an entity in exchange for such services constitutes a benefit that justifies the imposition of a fee, much less that the "largest player" in such a market may be named as a class of one to shoulder the entire burden of such a fee.

Still worse, the amount of the fee sustained by the court of appeals is completely arbitrary -- Congress offered no basis for setting that amount in passing the fee, the Secretary offered none in defending it, and the courts supplied none in upholding it. The decision below thus gives the legislature unbridled discretion to invade the assets of the largest service providers to governmentally sponsored programs. Although the court of appeals noted that limits must be imposed "to prevent the unfair singling out that the takings clause is in part aimed to prevent," Pet. App. 11, it abdicated responsibility for imposing those limits.

Congress may have wide latitude to raise taxes or reduce expenditures in order to achieve its budgetary objectives. But it cannot be allowed to balance the budget or finance public programs by permanently depriving one private corporation of hundreds of millions of dollars merely because that corporation is the "largest player" in a governmental program. To do so would shift impermissibly, to one corporate citizen, "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227 (quoting *Armstrong*, 364 U.S. at 49).

B. The Decision Below Strips Federally Chartered Corporations Of Takings Clause Protection, And Sanctions The Unconstitutional Diversion Of State And Local Revenues To The Federal Treasury.

The court of appeals also relied on Sallie Mae's status as a GSE to justify the imposition of the fee. This justification followed from a dissection of Sallie Mae's federal charter in search of governmentally conferred benefits that might reciprocate for the imposition of the fee. Notably, offsetting bur-

dens imposed upon Sallie Mae by restrictions in that charter on the scope of its business activities were not taken into account.

This search turned up little of putative value other than Sallie Mae's charter exemption from state and local taxes. But this exemption merely confirms the immunity from such taxes for all federally chartered corporations that arises under the Supremacy Clause of the Constitution.[10] *See Federal Land Bank of Wichita v. Board of County Comm'rs*, 368 U.S. 146, 149 (1961); *Osborn v. President of the Bank of United States*, 22 U.S. (9 Wheat.) 738, 865 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).[11] Charter confirmation of a Constitutional immunity was held by the appellate court to be of benefit because it "relieves [Sallie Mae] of any risk that it might be found not to qualify" for the immunity. Pet. App. 10. Any such risk is, however, imaginary.

There is no case that suggests an immunity arising from the Constitution -- which involves no cost to the federal government -- properly could be construed as a benefit conferred by the government in reciprocating for the imposition of a fee. To the contrary, the teachings of this Court indicate that any burden imposed by governmental action must be a "fair ap-

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[10] "Th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, para. 2.

[11] Observing that the power to tax involves the power to destroy, the *McCulloch* Court reasoned that if a state could tax a federally chartered corporation, then the state could tax it out of existence and thwart the legislative purpose underlying its federal charter. 17 U.S. (4 Wheat.) at 431-32. State and local governments therefore are precluded from using their powers of taxation "to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *Id.* at 436.

proximation of *the cost* of benefits supplied" in order to avert an unconstitutional taking. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (quoting *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)) (emphasis added).

A GSE's immunity from state and local taxes does not cost the federal government anything. Indeed, Sallie Mae and other GSEs pay higher income taxes to the federal government than would be the case if they were paying state and local income taxes and properly deducting them from the income reported on their federal returns. The immunity inheres in the Supremacy Clause to ensure that federal goals and policies can be implemented without interference from the states and localities. *McCulloch*, 17 U.S. (4 Wheat.) at 431-32. Here, exemption from state taxes -- which also is enjoyed by many other participants in the national secondary market for FFELP loans -- has served to further the federal goal of eliminating barriers to the creation of that market, thereby fostering the liquidity that is essential to the success of the federal program.

The rationale of the appellate decision is that by imposing the fee, Congress in essence has waived Sallie Mae's immunity from state and local taxes. The court of appeals had correctly observed that Congress could "waive Sallie Mae's immunity from state and local taxes by enacting a clear statement to that effect," at least where that immunity was found no longer to be necessary to foster a national secondary market in student loans. Pet. App. 10 (citing *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939)).

This *de facto* waiver theory is flawed in several respects. First, if Congress believed Sallie Mae's immunity from state and local taxes did not serve an overriding federal purpose, it would have had to abrogate that immunity expressly. *See Osborn*, 22 U.S. (9 Wheat.) at 865-66. Second, neither the language of the fee provision nor its legislative history suggest any relationship between the fee and Sallie Mae's immunity from state and local taxes. Indeed, Congress still could abro-

gate that immunity, yet Sallie Mae would nonetheless be subject to the fee because it has been singled out by name without regard to this or any other aspect of its GSE status. Third, the court of appeals' rationale assumed that there was a rough equivalence between the amount of the fee and the state and local tax savings, an issue as to which there was no record evidence.[12] Finally, the resulting payments end up in the federal Treasury, and the Supremacy Clause thus becomes a trick box for diverting funds that, under the court's rationale, properly should have flowed to the states and localities.

The court of appeals' decision thus raises serious questions of federalism that merit the attention of this Court, by effectively sanctioning the taking of funds from the states and localities in violation of their Fifth Amendment rights. *See United States v. Carmack*, 329 U.S. 230, 242 (1946). The court's rationale -- that organizations immune from state and local taxes may be required to pay a fee to the *federal* government in lieu of those taxes -- eviscerates the legitimate core powers of the states and localities to impose taxes critical to their sustenance. It invites Congress to charter an unlimited number of corporations exempt from state and local taxes, but subject instead to the payment of a federal fee.[13]

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[12] Especially since the tax savings that result from the immunity are readily susceptible to calculation (and are significantly less in magnitude than the 30 basis point fee), the court of appeals at a minimum should have remanded for a determination whether there is parity, or "average reciprocity of advantage," between those savings and the fee, even assuming the immunity could be deemed a governmentally conferred benefit in the first place. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[13] It is evident from the decision of the court of appeals that the two other attributes of Sallie Mae's GSE status upon which it relied could not on their own begin to support the imposition of a 30 basis point fee. Thus, Sallie Mae's exemption from SEC registration requirements was assumed by the court to result in legal and accounting cost savings, although there

The lower court's reliance on Sallie Mae's GSE status, and in particular its constitutional immunity from state and local taxes, at bottom rests on the notion that because Congress created Sallie Mae, it can appropriate its assets for the government's own use. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court rejected a similar argument. There, the Court overturned a Florida statute claiming for the government the interest earned on interpleader funds held in local courts. This amount was in addition to a fee charged to administer the funds, and thus, like the fee here, bore no relationship to any costs incurred by the government. *Id.* at 162. Florida's argument -- that the interest earnings on the depositor's assets constituted "public money" because the state created the interpleader fund that generated those earnings -- did not sway the Court, which concluded that the "exaction [wa]s a forced contribution to general governmental revenues." *Id.* at 163.

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was no evidence to this effect, and in fact, Sallie Mae's offering circulars for its debt securities meet or exceed SEC disclosure requirements. Further, as the court recognized, there was evidence that the exemption is attributable to the low risk nature of Sallie Mae's business under its restrictive charter. Pet. App. 10. The notion that the exemption "crystallizes Sallie Mae's special relationship to the market for student loans," and the possibility that Sallie Mae's "ill-defined" and "unused" access to low-cost Treasury borrowings -"may provide a marginal reduction in the risk of future insolvency," *id.*, plainly are too ephemeral to justify a fee that has already cost over $100 million and will cost hundreds of millions more. The court also ignored evidence that Sallie Mae has sought and obtained congressional approval of a rechartering initiative under Title VI of the Student Loan Marketing Association Reorganization Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, pursuant to which shareholders of Sallie Mae would exchange their stock for shares in a new state chartered holding company. The GSE would continue to exist as a subsidiary of the holding company for a period of up to ten years, during which it may continue to hold existing and newly acquired FFELP loans. The rechartering initiative demonstrates Sallie Mae's determination that the limitations imposed by its federal charter outweigh any benefits of its GSE status.

If allowed to stand, the appellate court's decision foreshadows severe consequences for all GSEs and their investors. Other GSEs, some of which are considerably larger than Sallie Mae, likewise are immune from state and local taxes. The court's decision is a green light to Congress to impose arbitrary fees on those entities that could involve, in the aggregate, billions of dollars, in order to reduce the federal deficit. The fundamental unfairness to investors of asset forfeitures based upon GSE status, coupled with the implications of such forfeitures with respect to the rights of the states and localities, warrant this Court's review.

CONCLUSION

For the foregoing reasons, we respectfully request that Sallie Mae's petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5428

Argued October 18, 1996
Decided January 10, 1997

STUDENT LOAN MARKETING ASSOCIATION,
APPELLANT/CROSS-APPELLEE

v.

RICHARD W. RILEY, SECRETARY OF THE UNITED STATES
DEPARTMENT OF EDUCATION,
APPELLEE/CROSS-APPELLANT

Consolidated with
No. 96-5016

Appeals from the United States District Court
for the District of Columbia
(No. 95cv00717)

Before: WALD, WILLIAMS and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Concurring Opinion filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge*: In the Omnibus Budget Reconciliation Act of 1993, Congress added § 439(h)(7) to the Higher Education Act of 1965, imposing a 0.3 percent "offset fee" on the principal amount of each student loan that the Student Loan Marketing Association ("Sallie Mae") "holds." The Department of Education interpreted the statute as applying to any loan in which Sallie Mae has a financial interest,

and, in particular, to loans that Sallie Mae has "securitized." (A firm "securitizes" assets by conveying them to a separate entity, typically a "bankruptcy-remote vehicle," which pays the securitizing firm with the proceeds of newly issued securities backed by the transferred assets. See Lynn M. LoPucki, "The Death of Liability," 106 Yale L.J. 1, 23 (1996).) Sallie Mae sued in district court, alleging that the statutory fee was a taking without just compensation and that the Department's claim that the fee applied to securitized loans ran counter to the unambiguous meaning of the statute.

The district court rejected Sallie Mae's taking claim, but it invalidated the Department's attempted application of the fee to securitized loans. Because the Higher Education Act affords Sallie Mae benefits roughly approximating the burden of the offset fee, which in any event applies only to loans *acquired* by Sallie Mae after the effective date of the amendment, we affirm the decision that there was no taking. As to the application of § 439(h)(7) to securitized loans, we agree with the district court that the Department's interpretation of the statute was impermissible. Because the Department has not yet applied a correct interpretation to loans subject to the sort of arrangements that Sallie Mae has adopted and proposes for the future, we reverse and remand to the district court, for it to remand the case to the Department.

* * *

Under the Guaranteed Student Loan Program the federal government serves as guarantor of unsecured student loans and subsidizes interest payments on those loans. A single loan may, in the course of its lifetime, make its way through three different institutions--a bank, a secondary institution (such as Sallie Mae), and a guaranty agency--before the federal government finally intervenes and makes good on its guarantee.

Sallie Mae was established in 1972 to provide lender banks with greater liquidity. See 20 U.S.C. § 1087-2(a). It is a source of financing for participating banks (it makes loans

secured by guaranteed student loans) and a major purchaser of student loans in the secondary market. Operating under a federal charter, it is a for-profit, privately owned corporation, but it also enjoys certain benefits such as an exemption from state and local taxes other than real estate taxes. See *id.* § 1087-2(b)(2).

Guaranty agencies, usually state-run, non-profit organizations, act as intermediaries for the federal government. They enter into guaranty agreements with banks and secondary institutions, and, in the event of default, take over the loan and reimburse the financial institution. See *id.* § 1075(b). If the guaranty agency is unsuccessful in collecting the loan, it may file a claim with the Department of Education for reimbursement. See *id.* § 1078(c). Federal interest payments and the federal guarantee are contingent on compliance with elaborate procedures that control every aspect of the loan, from the initial explanation to the borrower to the dunning methods employed if the loan falls delinquent. See, e.g., *id.* § 1080(a), (d); Sallie Mae Funding Corporation, Registration Statement dated August 7, 1995 ("Registration Statement") 14 (listing "Risk Factors").

The 1993 amendment, § 439(h)(7) of the Higher Education Act, reads as follows:

> (A) The Association [Sallie Mae] shall pay to the Secretary, on a monthly basis, an offset fee calculated on an annual basis in an amount equal to 0.30 percent of the principal amount of each loan made, insured or guaranteed under this part that the Association *holds* . . . and that was acquired on or after August 10, 1993 . . . .
>
> (C) The Secretary shall deposit all fees collected pursuant to this paragraph into the insurance fund established in section 1081 of this title.

20 U.S.C. § 1087-2(h)(7) (emphasis added), enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, Subtitle B. The fund referred to in subsec-

tion (C) is available for payment on defaulted loans. See 20 U.S.C. § 1081(a).

After enactment of the offset fee provision, the Department learned, through a Sallie Mae submission to the Office of Management and Budget, that Sallie Mae was planning to securitize a portion of its loan portfolio and that it believed that securitized loans would be exempt from the fee. Essentially, Sallie Mae proposed to create a trust that would purchase Sallie Mae loans, financing the purchase with the proceeds of securities that would be backed by the loans. The income generated by the loans in the trust would satisfy payments due on the securities. Sallie Mae would continue to be responsible for administration of the loans under a service contract with the trust and would retain certain residual financial interests in the trust assets.

On January 13, 1995 Steven Winnick, Acting General Counsel of the Department of Education, wrote a letter to Sallie Mae's general counsel (the "Winnick letter"), stating the Secretary of Education's position on the applicability of § 439(h)(7) to the securitized loans. It was, according to the letter, "appropriate to interpret the term 'holds' [in § 439(h)(7)] to include any loan in which Sallie Mae holds a direct or indirect financial interest." The letter pointed to the "residual interest" that Sallie Mae would retain in the trust, as well as to its role as servicer of the loans, and argued that "[n]either the words of [the statute], nor the applicable legislative history, suggests that Congress intended to limit the Secretary in defining the term 'holds' in § 439(h)(7)." The letter made it clear that the Department was under the impression that Sallie Mae was attempting to evade the fee; it analogized the case to the "Clifford regulations," under which the Internal Revenue Service had attributed the income of certain trusts to the grantor in order to prevent income tax avoidance.

Sallie Mae responded with a letter and an attached legal opinion critiquing the Winnick analysis, and representatives of Sallie Mae also met with Felix Baxter, Deputy General

Counsel of the Department, to press their argument. In a letter dated March 16, 1995 (the "Baxter letter"), Baxter answered some of the objections made by Sallie Mae and confirmed the view expressed in the Winnick letter. After another letter from Sallie Mae, its representatives met with the Secretary on April 12, 1995. He reiterated the Department's position, and Sallie Mae's representatives told him of their intention to bring suit. Since then, Sallie Mae has securitized about $4 billion in loans (out of a portfolio of at least $34 billion), in transactions roughly along the lines of the trust securitization described to the Secretary.

Taking Claim

As a preliminary matter, we must address the issue of whether we have jurisdiction over Sallie Mae's taking claim. Sallie Mae requests a declaratory judgment that the offset fee imposed by Congress is an unconstitutional taking in violation of the Fifth Amendment. Normally a taking claim against the federal government must be brought as a suit for money damages (i.e., the "just compensation" that the Constitution assures) under the Tucker Act in the Court of Federal Claims, 28 U.S.C. § 1491, or, for amounts not exceeding $10,000, under the Little Tucker Act in district court. 28 U.S.C. § 1346(a)(2); see *Preseault v. ICC*, 494 U.S. 1, 11-12 (1990); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016-19 (1984). So long as such jurisdiction is available, the plaintiff is barred from suing for equitable relief in district court, see *Ruckleshaus*, 467 U.S. at 1020, or is required to seek a Tucker Act remedy first, before suing for equitable relief, see *Preseault*, 494 U.S. at 11. (The Tucker Act and Little Tucker Act themselves do not normally supply a waiver of sovereign immunity for equitable relief. See *Richardson v. Morris*, 409 U.S. 464, 465 (1973).) The Court has stated broadly that a Tucker Act remedy is available *unless* "Congress has . . . *withdrawn* the Tucker Act grant of jurisdiction . . . to hear" the claim for compensation. *Presault*, 494 U.S. at 12

(emphasis in original, internal quotations and citations omitted).

Despite that broad language, the Supreme Court has itself ruled on the merits of federal taking claims, without making any inquiry as to whether Tucker Act jurisdiction had been withdrawn, and even though plaintiffs had made no attempt to pursue a Tucker Act remedy. See *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). This could, of course, be oversight. But in *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995), the Second Circuit offered an explanation for such cases, pointing out that they involved mandates of "direct transfers of money to the government." *Id.* For such cases, use of the Tucker Act remedy would entail an utterly pointless set of activities, as "[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *Id.* It contrasted cases such as *Concrete Pipe* and *Connolly* with ones involving statutes that burdened "real or tangible property," *id.*, for which the Tucker Act remedy would be presumptively sensible. *Chateaugay's* reading of the cases appears sound. To rephrase its analysis more directly in the language of *Preseault*, then, in cases involving straightforward mandates of cash payment to the government, courts may reasonably infer either that Tucker Act jurisdiction has been withdrawn or at least that any continued availability does not wipe out equitable jurisdiction. Accordingly, we reach the merits.

The Fifth Amendment states that private property shall not "be taken for public use without just compensation." It does not follow, however, that the imposition of a special regulatory burden on a person or entity is necessarily a taking. If the regulatory action in question benefits the burdened persons, and the amount of the burden is "a fair approximation of the costs of benefits supplied," then no taking is said to have occurred. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (quoting *Massachusetts v. United States*, 435 U.S.

444, 463 n.19 (1978)); see also *Colorado Springs Prod. Credit Ass'n v. Farm Credit Administration*, 967 F.2d 648 (D.C. Cir. 1992); cf. Richard A. Epstein, Takings 195 (1985) (characterizing benefits conferred by legislation as "implicit in-kind compensation" for regulatory takings).

In *Colorado Springs* we considered legislation requiring the healthy banks in the Farm Credit System to make a contribution to a scheme for bailing out the entire system. Under the scheme Congress "vindicat[ed] the market's perception that the United States implicitly stood behind the Farm Credit System" by providing an explicit guarantee. 967 F.2d at 651. Despite the apparent health of the complaining banks, the rescue operation redounded to their benefit because they were so "lashed together" with the unhealthy ones that the failure of the latter would have dragged them down as well. 967 F.2d at 654-55. We found that the various features of the legislation gave the healthy banks "substantial, concrete, and direct" benefits. *Id.* at 655. As it would have been impracticable to show dollar-for-dollar equivalency, the evidence of "rough equivalency of benefit and burden" was enough to defeat the taking claim. *Id.* at 656 n.9.

Section 439(h)(7) is different from the bailout legislation assessed in *Colorado Springs* in a number of ways. First, the benefits of the Higher Education Act, which are enjoyed by student borrowers, institutions of higher education, and numerous private and state lending institutions, are more widely distributed than in *Colorado Springs*, where many of the farmers who had access to credit because of the banking system were also owners of the banks in the system. Nonetheless, because students cannot pledge their human capital in any way paralleling the use of physical capital as security, the student loan market would likely be a fraction of its current size without the federal guarantees. And, in fact, there has been a high rate of default on student loans. See *Permanent Subcomm. on Investigations, Abuses in Federal Student Aid Programs*, S. Rep. No. 102-58, at 1 (1991). As the largest player in this artificially generated market, Sallie Mae is a--

perhaps the--prime beneficiary of the loan guarantee fund that the offset fee helps underwrite. This distinction from *Colorado Springs*, then, is one of degree.

Sallie Mae also notes that the fee was passed as part of the 1993 Budget Act for the purpose of generating government revenue, not to stave off a crisis in the system of which it is a part, as had been the case in *Colorado Springs*. Given the application of the offset fee revenue to the guarantee fund, however, this distinction appears almost immaterial. A third distinction is that Sallie Mae is already burdened by the requirement that it serve as lender-of-last-resort to students who meet the federal loan criteria but pose risks that are excessive in the eyes of all other financial institutions (even with the guarantee); the offset fee comes on top of that. We return to this issue later in addressing the prospective nature of the offset fee.

Apart from Sallie Mae's role as a beneficiary of the basic system of loan guarantees, the government points to a number of specific advantages it has received. We start by discarding three of them as of little or no relevance: (1) startup financing from the government permitting Sallie Mae to borrow at a lower interest rate than would otherwise have been available, see 20 U.S.C. § 1087-2(b)(3); (2) a market perception that the government would bail out Sallie Mae with federal funds in the event of widespread defaults; and (3) a statutory capital requirement of two percent of assets, significantly lower than the roughly eight percent requirement characteristically applicable to the commercial financial institutions with which Sallie Mae competes, 20 U.S.C. § 1087-2(r)(4); Oxendine Decl. ¶ 5(c).

The initial seed capital is pure history. Sallie Mae borrowed no funds under this authorization after 1982 and has fully repaid the debt in accordance with the terms of the agreement. Nowhere in the agreement did the government reserve the right to impose a future fee on Sallie Mae, and government exactions eleven years after the last borrowing cannot possibly be viewed as compensation for previously

granted benefits. Many persons and firms receive one-time tax breaks, as well as other forms of financial incentives, and to hold that this allows legislators forever after to impose financial burdens upon the earlier beneficiaries would largely gut the takings clause. Imagine the surprise, for instance, of the holders of land patented gratis by the federal government under the Homestead Acts if they were to wake up and discover that the government could subject them to a special tax because of the way title had been acquired, generations before.

Nor does the apparent market perception that the government will use public funds to prevent the failure of Sallie Mae, unsupported by anything in Sallie Mae's federal charter or offering circulars for debt securities, constitute a relevant benefit. While the perception presumably gives Sallie Mae a distinct advantage over private and state institutions in the secondary student loan market, the benefit was created inadvertently by the government through its past actions, and not by any enforceable guarantee made in Sallie Mae's charter or elsewhere.

The two percent capital requirement applicable to Sallie Mae does not set it apart in any meaningful way from the other banks in the student loan system. The regulations that establish capital standards for such banks adjust for the risk of the different types of assets held by banks. Since federally guaranteed student loans fall into a relatively low-risk category, the capital standard for Sallie Mae's competitors is, according to Sallie Mae's calculations, uncontested by the government, 20 percent of eight percent, i.e., 1.6 percent. Thus a competitor confining its activities to student loans would evidently be in a better position than Sallie Mae on this score.

The more persuasive specific benefits accruing to Sallie Mae by virtue of its place in the Federal Student Loan Program, which the fee in part finances, are these: (1) exemption of debt offerings from SEC registration requirements; (2) exemption from state and local taxes, 20 U.S.C. § 1087-2(b)(2);

and (3) access to borrowing from the Federal Financing Bank, 20 U.S.C. § 1087-2(h)(6), which is said to be at low cost, although Sallie Mae has not borrowed from the bank apart from the initial seed money loan now fully repaid. District Court Opinion 4; Oxendine Decl. ¶ 5(d).

The most telling of these is probably the statutory exemption from state and local tax liability. Sallie Mae responds by saying that even without the specific exemption it would qualify for such relief as a federal instrumentality. See *Dep't of Employment v. United States*, 385 U.S. 355 (1966). The explicit statutory exemption at a minimum, however, saves Sallie Mae the burden of litigation to establish its status, and of course relieves it of any risk that it might be found not to qualify. Moreover, the exemption is a continuing benefit because Congress could at any time waive Sallie Mae's immunity from state and local taxes by enacting a clear statement to that effect. Cf. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939).

The other benefits also appear material. The exemption from SEC registration requirements saves Sallie Mae legal and accounting fees. Although Sallie Mae attributes the exemption to the restrictive nature of its federal charter, which largely limits its operations to the secondary market for student loans, at a minimum it crystallizes Sallie Mae's special relationship to the market for student loans and the risk reduction afforded by the government guarantee. Finally, even though Sallie Mae's non-use of low-cost Treasury borrowing suggests its value is limited, the access to such borrowing (which is ill-defined on this record) may provide a marginal reduction in the risk of future insolvency.

Although Sallie Mae's various advantages are hard to quantify, viewed in the absolute the Higher Education Act appears to contain the "rough equivalency" that we found sufficient in *Colorado Springs*. Sallie Mae argues, however, that by singling it out of all of the "holders" of government-guaranteed student loans for the payment of the offset fee, Congress unjustly burdened it for benefits shared by all such

holders. In *Colorado Springs*, however, we rejected a comparable argument advanced by the complaining banks, in which they claimed that their forced contribution could not stand because other, unhealthy banks that were greater beneficiaries of the bailout program, were not required to make the contribution. "The question is not," we said, "whether there were other subgroups who could or should have borne a greater share of the burden as a policy matter; the judiciary is not institutionally fitted to undertake such an inquiry." 967 F.2d at 656.

Of course there are limits. One can imagine provisions that, viewed in isolation, provide an excellent match of benefit with burden, but that also supply identical benefits to a host of similarly situated entities. The entities to which Sallie Mae compares itself, however, are distinctly different. On the one hand, there are non-profits and state agencies. But these entities already are exempt from state and local taxation (to take Sallie Mae's most salient benefit) by virtue of special attributes that Sallie Mae does not possess. Without a tax exemption, Sallie Mae would occupy the ordinary position of a for-profit firm in competition with non-profits--an unenviable position, to be sure, but not an unconstitutional one. (While as a matter of policy Congress has gone some way to levelling the playing field for non-profits and for-profits, and has restricted the ability of non-profits to compete with for-profit entities by means of the tax on unrelated business income, see 26 U.S.C. §§ 511-15; *United States v. Am. College of Physicians*, 475 U.S. 834, 837-38 (1986), no one has ever suggested that this tax is constitutionally mandated.) The other competitors that Sallie Mae points to as better treated are for-profit banks in the business of making guaranteed student loans. But these firms plainly do not enjoy the exemption from state and local taxes. Thus, while the courts must impose limits on the possible manipulation of benefits and burdens to prevent the unfair singling out that the takings clause is in part aimed to prevent, whatever mismatch exists here is

beyond what the judiciary is "institutionally fitted" to condemn.

To the extent that the above features leave the matter in doubt, the fee's solely prospective application--to loans acquired by Sallie Mae after the effective date of the amendment, August 10, 1993--resolves them. Purely prospective burdens do not present the same constitutional difficulties as retroactive ones, as the affected parties can take measures to protect themselves against, or at least mitigate, the otherwise resulting loss. See *In re Thompson*, 867 F.2d 416, 422 (7th Cir. 1989); cf. *United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982) (construing bankruptcy provision as affecting only property rights acquired after enactment in order to avoid the taking issue that would otherwise have been presented). Except for the loans acquired pursuant to its responsibility to act as a lender-of-last-resort, Sallie Mae evidently may cease acquiring loans altogether. Indeed, Sallie Mae itself, in the context of arguing that its advantages as a government-sponsored entity are trivial, says that it is free to abandon its special status and turn its business over to a conventional, for-profit firm. If so, its shareholders could avoid both the fee *and* the burdens borne as lender-of-last-resort. More generally, Sallie Mae does not appear to argue that its charter restrictions prevent it from migrating into deployments of its physical and human capital that would be indisputably free of the 0.3% fee and roughly as profitable as its business before imposition of the fee.

We must reject the claim that the offset fee imposes an unconstitutional taking on Sallie Mae.

Application to Securitized Loans

On the second substantive issue we again face jurisdictional questions. The Secretary makes a series of interrelated arguments on the subject. First, he claims that the Winnick and Baxter letters defining "hold" were not final agency action. Even assuming they were, he contends that, by the time of the district court decision, the interpretation was moot be-

cause Sallie Mae had undertaken a securitization transaction that was different from the hypothetical presented to the Department. Finally, the Secretary asserts that the letters' interpretation of § 439(h)(7) is not ripe for review because the Department never had an opportunity to consider the particulars of the transaction actually carried out by Sallie Mae.

Under the Administrative Procedure Act we can review only final agency action. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Though the overwhelming bulk of agency correspondence is probably non-final, in *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971), we found final action in an interpretation of law set forth in a letter from the Administrator of the Wage and Hour Division of the Department of Labor. "[1] When a published interpretation represents the initial views of an agency, approved by the Commission or person who heads the agency, [2] when it is the product of the process provided by the agency for taking into account the position of agency staff as well as the outside presentation, [3] when the interpretation is not labeled as tentative or otherwise qualified by arrangement for reconsideration," then it is final for purposes of judicial review. *Id.* at 702.

Here all three criteria are satisfied. The Secretary of Education endorsed the interpretation of § 439(h)(7) set forth in the two letters. In the Winnick letter, the Acting General Counsel of the Department said that he was communicating the position of the Secretary. In the Baxter letter, the Department's Deputy General Counsel wrote "we have concluded that our initial view was correct and that the offset fee would be owed on loans transferred to a business trust," evidently referring to the position of the Secretary and the Department in the initial letter. And when Sallie Mae's representatives met with the Secretary, he stood by the Department's interpretation. There is no doubt that the position stated in the letters was a "marching order[]" valid for all of the Department. *NRDC v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988) (holding that director of relevant component unit could

issue memorandum constituting final agency action even though he was a subordinate agency official).

The position was stated unequivocally. Although the Winnick letter said "[w]e will be glad to review the details of any particular transaction that Sallie Mae believes is an outright sale rather than a continued holding," the preceding paragraphs made it abundantly clear that, on the issue of whether any direct or indirect financial interest was enough to hold a loan, and on the issue of whether, in a "typical securitization" the assets in question would cease to be "held" by Sallie Mae, the Secretary had made up his mind. The second letter and the meeting with the Secretary confirmed that the Department's view was definitive.

Finally, the Winnick letter and the later developments overwhelmingly suggest that the Department's interpretation was the product of agency deliberation informed by Sallie Mae's position. Assuming the Winnick letter may have been inadequate on this score, it was followed by Sallie Mae's letter and legal memorandum, the meeting with Deputy General Counsel Baxter, the Baxter letter, and, finally, the meeting with the Secretary himself. It seems inescapable that the agency had adequate opportunity to deliberate, to bring staff expertise to bear, and to consider the implications of its interpretation, and that it did so.

The Secretary's mootness suggestion rests on the point that the securitizations actually performed by Sallie Mae have differed in some detail from those described to him in the communications leading to his letter determinations. Accordingly, he says, the district court's judgment was merely a "ruling in the abstract." The conclusion does not follow from the premise. If the actual securitizations differed so drastically from the one outlined to the Secretary as to suggest that in the future Sallie Mae would not pursue securitizations with substantially the same characteristics that elicited the Secretary's analysis, the argument would make sense. But the Secretary makes no claim that the differences are great enough to carry any such implication.

The Secretary finally argues that Sallie Mae's claim is not ripe. Recognizing that ripeness characteristically turns on whether the issues are fit for judicial review and whether the plaintiff will suffer hardship from delay of adjudication, see *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), the Secretary claims that Sallie Mae will suffer no hardship. This conclusion is clear, he says, from the fact that Sallie Mae went forward with securitizing loans even before the district court ruled.

In the regulatory context, the conventional treatment of hardship focuses on the dilemma of a party that must either incur the costs of obeying a regulation it believes invalid, or violate the command and run the risk of significant penalties. See *id.* at 152-53. Where conformity to a regulation would impose a large capital cost and no material operating costs, of course, a firm that conformed to the mandate could well be said to have mooted its hardship. A one-time capital investment will have been made and there will be no more hardship to be suffered. For a regulation that imposed operating costs but no capital costs, however, the actual choice of the firm to comply or not comply during the period of legal uncertainty would not, standing alone, materially contradict the claim of hardship. Compliance or non-compliance with this type of regulation would show only that the firm had chosen the least bad option in the light of the risks.

A legally disputable fee presents a firm with comparable trade-offs. Most obviously, a firm's choices would include (1) persisting in conduct that is plainly subject to the fee, (2) abandoning any semblance of that conduct, and (3) devising substitutes for the burdened conduct that, in the firm's opinion, reduce the probability that the fee will apply but that presumably entail some cost--for otherwise the firm would have employed the substitutes anyway. For a fee that does not require a one-time, lump-sum payment, but rather is calculated on a continuing basis as a percentage of the firm's volume of business, the firm's choice among these possibilities is as uninformative about the hardship created by the prolongation of

legal uncertainty as the choice made by the firm subject to an operating-costs-only regulation.

Here the case is slightly more complicated. Sallie Mae evidently would regard securitization as desirable for *part* of its portfolio even in a world completely free of the offset fee. Of the over four billion dollars in loans now securitized, it had acquired $800 million before the effective date of the statute; as they were not subject to the offset fee under any reading of § 439(h)(7), avoidance of the fee could not have been any part of Sallie Mae's motivation. Indeed, Sallie Mae's vice president and controller explained that (1) securitization is part of the firm's effort to "demonstrate to the equity market its ability to finance its business cost effectively as a state chartered corporation," Overend Decl. at 12, but that at the same time (2) securitization entails higher transaction costs than those incurred in Sallie Mae's "traditional debt issues," *id.* We do not claim to fully understand the nuances of Sallie Mae's strategy (which were not central to development of the record), but it is obvious that, at the margin, the risk of the offset fee alters the balance between conventional debt and securitization. Sallie Mae's securitization of $3.2 billion in loans subject to a risk of the fee shows only that, given its appraisal of the costs and benefits of the alternatives available to it, it regarded $3.2 billion as the optimal amount. By the same token, its uncontradicted allegations show that the risk is a factor in that balance, so that its continued exposure to the risk alters its conduct in a costly way. That is enough.

Accordingly we reach the merits of Sallie Mae's attack on the Department's ruling that the term "holds" includes "any loan in which Sallie Mae holds a direct or indirect financial interest." Winnick letter at 2. We must uphold the agency if its interpretation flows from the unambiguous meaning of the statute or is a reasonable construction of ambiguous statutory language. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Sallie Mae starts with something of an ace. Although the Higher Education Act does not define the verb "holds," the

precise word used in § 439(h)(7), it does define the noun "holder" for purposes of the Act, specifically as "an eligible lender who owns a loan." 20 U.S.C. § 1085(i). Although it is possible that the definition applies *only* when the word appears in the form of a noun, such a reading is not on its face very plausible. Cf. *United States v. Granderson*, 511 U.S. 39, 46 (1994) (noting "textual difficulty" in party's proposing to give different constructions to term used both as a noun and a verb in the same statutory proviso). But see *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996) (finding different meaning where context supported such an interpretation). This is especially the case where, as here, the common meaning and the statutory definition of the word overlap. For instance, Webster's Third New International Dictionary Unabridged 1078 (1961), defines the verb "to hold" as "to retain in one's keeping: maintain possession of: not give up or relinquish: possess, have." Nothing in the common meaning of "to hold" belies resort to the statutory definition of "holder" to illuminate the meaning of the verb form. Nor does *Webster's* include among the meanings of "hold," occupying two long columns of fine print, anything remotely resembling the Secretary's idea that one holds anything in which one has any financial interest.

The Secretary offers a structural argument for supposing that, even though a "holder" means an "owner," "holds" does not mean "owns." He points to a specific provision in the statute that, he argues, draws a distinction between the two:

> Loans made by eligible lenders in accordance with this part shall be insurable by the Secretary whether made from funds fully *owned* by the lender or from funds *held* by the lender in a trust or similar capacity and available for such loans."

20 U.S.C. § 1076 (emphasis added).

We think the argument affords him little help. First, the provision does not relate to the context in which the term "holder" in the general statutory definition is linked with the

term "holds" in § 439(h)(7), namely, the task of *identifying* the "holder" of, or who "holds," a loan. Instead, the section refers to the distinct issue of the *type* of ownership that is permissible for student loans, namely, both "full[]" ownership and ownership of only legal title, without the beneficial interest. Second, although the section employs the terms "owned" and "held" independently, it does so in a context where that drafting choice makes no difference whatever: the point of § 1076 is simply to make clear that even a person holding (or owning) funds as trustee is an eligible buyer.

Of course the section recognizes that there is some elasticity in the idea of ownership, stretching (at least) from "full[]" legal and equitable title to legal title, but that is completely different from breaking down the apparent statutory equation of holding and owning. We will return to the issue of what "owns" means shortly in a discussion of the flexibility left to the Secretary under our reading of § 439(h)(7).

The Secretary also contends that Sallie Mae, through a representation made in its Registration Statement, admits to holding securitized loans under its own view of the meaning of "hold." A lender may make a consolidation loan only if that lender "holds" a student loan, or is approached by a borrower who certifies that none of the current holders of the borrower's existing loans offers consolidation loans. See 20 U.S.C. § 1078-3(b)(1)(A). Since Sallie Mae's Registration Statement states that it will continue to make consolidation loans available to borrowers whose loans have been transferred to the trust, Registration Statement at 24, the Secretary argues that Sallie Mae must believe that it will still "hold" those loans. But Sallie Mae's representation carries no such implication. Sallie Mae can relinquish ownership of loans when they are put into the trust, but then repurchase them when it wishes to make consolidation loans; evidently it does exactly that.

As to legislative history, the litigants have pointed to none shedding any direct light on the meaning of "holds,"

"owns," or "holder," and we have discovered none on our own.

In seeking to break out from the apparent statutory equation of holding and owning, the government notes that Congress is not bound by the statutory canon that the same word used in closely related provisions of a statute should be expected to have the same meaning. See *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). It therefore turns to broad arguments about the purpose of the statute, aimed at showing that Congress could not have intended that the term "holds" in § 439(h)(7) be governed by § 1084(i)'s definition of "holder." In its core form, the argument is an assertion that, if the Secretary's view is rejected, the government might collect less revenue than Congress had hoped. Obviously this goes much too far. If accepted, it would allow the government to assess the fee even if Sallie Mae completely dropped its current business and instead dedicated itself wholly to the provision of services related to student loans.

Further, the Secretary's exclusive focus on revenue assumes that Congress's *primary* goal was ipso facto its only goal. "But no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). We see no evidence that § 439(h)(7) was the product of monomaniacs. Congress clearly tempered its desire for revenue with a careful selection of means--imposition of a fee on Sallie Mae proportional to the dollar amount in loans that Sallie Mae "holds" (and acquired after the date of enactment). That choice must also be honored.

A closely related argument is the Secretary's suggestion that, in the absence of his interpretation, Sallie Mae would be able to "evade" or "avoid" the fee. See Baxter letter at 2, 3. The two deserve separation. Persons are permitted to structure their affairs so as to reduce the incidence of taxation. See *Bullen v. Wisconsin*, 240 U.S. 625, 630-31 (1916) (Holmes, J.). They may "avoid" the payment of burdens that would flow from persisting in the status quo. They typically may

not, however, "evade" burdens, i.e., escape a tax by engaging in sham transactions that preserve the economic reality of the relationship that Congress has burdened.

It seems doubtful if even the Secretary seriously thinks that, to prevent evasion, it is necessary to define "holds" as embracing "any loan in which Sallie Mae holds a direct or indirect financial interest." One of the purposes of Sallie Mae's enabling legislation was to enrich the supply of funds for student loans by enabling lenders to borrow capital from Sallie Mae using student loans as security. See 20 U.S.C. §§ 1087-2(a), 1087-2(d)(2). If the Secretary's formula were right, all loans in which Sallie Mae held a security interest would be subject to the offset fee, a logical application that the Secretary nowhere asserts.

In the pertinent letters, the Department also offered more restrained analyses of the underlying theory behind the fee:

> The offset fee is intended to partially repay the taxpayers, in the form of the FFEL [Federal Family Education Loan] program fund, for the benefits Sallie Mae has received from its statutory role in the FFEL program. In addition, the fee is intended to help 'even the playing field' in the student loan secondary market by reducing the financial advantage Sallie Mae has over other secondary markets because of its status as a Government Sponsored Enterprise.

Winnick letter at 1.

These ideas of implicit reciprocity are, of course, akin to the very grounds that we considered earlier in rejecting Sallie Mae's argument that the fee effected a taking of its property. The Secretary does not explain why accomplishment of these purposes cannot be achieved within the notion of ownership that the statute itself employs. Moreover, other parts of the Secretary's statements engage in an analysis suggesting reconciliation of those purposes with the idea that § 439(h)(7) covers only loans owned by Sallie Mae. The Baxter letter, for example, in analysing the hypothetical securitization transac-

tion, contends that Sallie Mae should pay the fee because the holders of "equity" certificates in the trust receive a "return . . . limited to principal and interest and they do not share in any final profits of the trust." Baxter letter at 1. Here the focus seems to be on which party has a claim to residual profits, which is characteristically seen as the--or at least an--essential attribute of ownership. See, e.g., Henry Hansmann, "Ownership of the Firm," 4 J.L. Econ. & Org. 267, 269 (1988). Had the Department developed this line of reasoning, it might have arrived at a permissible interpretation of the statute. The rights necessary to ownership for these purposes might, of course, be different from simple legal title.

The assertion that Sallie Mae must be deemed to "hold" any loan in which it "holds a direct or indirect financial interest" is flawed not only qualitatively (sweeping up loans that Sallie Mae cannot in any normal sense of the word be said to own) but also quantitatively. If Sallie Mae had a 5% equity interest in a corporation that owned a loan, but no other financial or control interest in the corporation, the Secretary's interpretation would subject the entire loan to the fee. Without addressing whether the Secretary might deem Sallie Mae to be the holder of any part of the loan under those circumstances, we can say firmly that he could not treat it as the holder of 100%.

Because the Secretary considered Sallie Mae's securitizations under a flawed understanding of the word "holds" as used in § 439(h)(7), we cannot sustain his conclusion that a securitized portfolio is held by Sallie Mae. If the offset fee is to be applied to loans securitized by Sallie Mae under the sort of arrangement proposed by Sallie Mae in its letters to the Department, or later carried out in practice, this must occur (if at all) within the statutory terms defining "holder" as equivalent to "owner."

* * *

We affirm the district court in its rejection of Sallie Mae's claim that the fee effected a taking of Sallie Mae's

property. We affirm the district court's judgment striking down the Department's ruling that § 439(h)(7) embraces any loan in which Sallie Mae "holds a direct or indirect financial interest." Because the Department has not applied a correct understanding of "holds" in determining § 439(h)(7)'s possible coverage of loans securitized by Sallie Mae, we remand the case to the district court for it to remand the matter to the Secretary.

So ordered.

WALD, *Circuit Judge, concurring*. I agree with the majority that the fee imposed on loans held by Sallie Mae under 20 U.S.C. § 1087-2(h)(7) (1994) does not constitute a taking, that the Department's interpretation of the fee provision as applying to any loan in which Sallie Mae "holds a direct or indirect financial interest" is impermissibly broad, and that we must therefore remand for the Department to apply a correct definition of "holds" in determining whether and how the fee provision applies to loans securitized by Sallie Mae. I write separately out of an apprehension that the majority's opinion suggests at times an unduly restrictive definition of "holds" that focuses excessively on the extent to which Sallie Mae retains an equity stake in the loans or the entity to which it transfers the loans. While I agree that the extent of Sallie Mae's equity stake in the loans is significant, I believe that other factors may be equally relevant in determining whether Sallie Mae could legitimately be said to "hold" the loans. These factors include, for example, the degree to which Sallie Mae can control the loans, whether Sallie Mae continues to receive financial benefits from the loans, whether Sallie Mae has a right to buy back the loans, and whether Sallie Mae can control the trust or corporation to which it transfers the loans. Emphasizing these factors is not incompatible with the majority's equation of "holds" with "owns," since these factors are often viewed as indicia of ownership. *See, e.g., United States v. 526 Locum Drive*, 866 F.2d 213, 217 (6th Cir. 1989) (holding that in order to have standing to challenge forfeiture

of property, where evidence indicates claimant may be nominal owner, claimant must "present evidence of dominion and control or other indicia of true ownership," not merely legal title); *S.S. Silverblatt, Inc. v. East Harlem Pilot Block Bldg. 1 Hous. Dev. Fund Co., Inc.*, 608 F.2d 28, 37 (2d Cir. 1979) (holding that under public housing program HUD possesses "almost all of the indicia of actual ownership except the status of title holder of record," where HUD controls planning, development and operation of housing project). Indeed, the majority itself notes that the "rights necessary for ownership for [purposes of determining the applicability of the fee provision] might . . . be different from simple legal title." Majority opinion at 21.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5428

September Term, 1996

STUDENT LOAN MARKETING ASSOCIATION,
APPELLANT/CROSS-APPELLEE

v.

RICHARD W. RILEY, SECRETARY OF THE UNITED
STATES DEPARTMENT OF EDUCATION,
APPELLEE/CROSS-APPELLANT

CONSOLIDATED WITH 96-5016

Appeals from the United States District Court
for the District of Columbia
(No. 95cv00717)

On Appellant/Cross-Appellee's Petition for Rehearing

Before: WALD, WILLIAMS and GINSBURG, *Circuit Judges.*

ORDER

Sallie Mae petitions for rehearing, noting that because the district court held that the statute did not embrace securitized loans, that court should not have addressed the constitutionality of the fee as applied to such loans. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). We agree. Similarly, as we rejected the Secretary's grounds for applying the fee to securitzied loans, nothing in our decision should be taken as expressing any opinion on the constitutionality of the fee in

that context, nor on whether there is any distinction, for constitutional purposes, between securitized loans and ones "held" by Sallie Mae in the most conventional sense of the term.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

Filed: March 11, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 95-717
(Stanley Sporkin)

STUDENT LOAN MARKETING ASSOCIATION,

Plaintiff,

v.

RICHARD RILEY,

Secretary of the United States
Department of Education,

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on cross-motions for summary judgment. Plaintiff, Student Loan Marketing Association ("Sallie Mae"), challenges a provision of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") which imposes an annual fee on student loans which Sallie Mae acquires in the secondary market.[1] The annual fee is equal to 0.30 percent (30 basis points) of the principal amount of each loan Sallie Mae "holds." Plaintiff seeks a declaratory judgment that the statutory provision is unconstitutional on its face as an uncompensated taking of private property and a denial of equal protection in violation of the Fifth Amendment. Plaintiff also asks this Court to declare that the Secretary of Education has acted arbitrarily and capriciously in interpreting the provision to require payment of the fee on loans which

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[1] Pub. L. No. 103-66, Aug. 10, 1993, 107 Stat. 356, 367 (codified at 20 U.S.C. § 1087-2(h)(7)(A)).

Sallie Mae transfers to a separate trust as part of a privatization transaction.

Defendant moves the Court to dismiss the claim for lack of jurisdiction and failure to state a claim. In the alternative, Defendant seeks summary judgment declaring that the statutory provision imposing fees on loans which Sallie Mae "holds" is constitutional, and affirming the decision of the Secretary.

FACTUAL BACKGROUND

This case has its roots in the Higher Education Act of 1965 ("HEA") which, as amended, created the Guaranteed Student Loan Program[2] to increase the availability of financial assistance to students seeking a college education. In 1992, Congress changed the name of the program to the Federal Family Education Loan ("FFEL") Program. Pub. L. No. 102-325, Title IV, § 411(a)(1), 106 Stat. 510.

Under the FFEL Program, financial institutions make low-interest loans to students or their families, which are guaranteed by state or non-profit guaranty agencies that are reinsured by the United States, through the Department of Education ("DOE"). Section 431 of the HEA creates a student loan insurance fund for making payments in connection with the default of loans insured by the Secretary of Education under the Program. 20 U.S.C. § 1081.

In 1972, Congress created Sallie Mae to enhance financial support for federally-guaranteed student loans. 20 U.S.C. § 1087-2. Sallie Mae's charter restricts the authorized activities in which it may engage. 20 U.S.C. § 1087-2(d). It further defines the types of obligations Plaintiff may incur,[3] and subjects the entire enterprise to general oversight by the Depart-

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[2] 20 U.S.C. § 1070 *et seq.*

[3] *See* 20 U.S.C. § 1087-2(h).

ment of Education and general financial oversight by the Department of Treasury. *See* 20 U.S.C. § 1087-2(r).

Sallie Mae is controlled by a Board of Directors of 21 members. Seven members are appointed by the President of the United States, with 14 members being elected by Sallie Mae shareholders.[4] The President appoints the Chairman of the Corporation from among the 21 board members. 21 U.S.C. § 1087-2(c)(1).

Sallie Mae's status as a government-sponsored enterprise ("GSE") has given it a number of advantages that affect its costs and profitability: (1) Sallie Mae received start-up financing through the Federal Financing Bank with a Department of Education guarantee; this allowed Sallie Mae to borrow at a lower interest rate than otherwise would have been available; (2) Sallie Mae's capital/debt ratio requirements are significantly lower than those of commercial banks and other financial institutions participating in the FFEL Program;[5] this increased Sallie Mae's liquidity; (3) the extensive links between Sallie Mae and the federal government have created a market perception that the government would use federal funds to prevent a default of Sallie Mae debt; (4) Sallie Mae's debt offerings are exempt from SEC registration

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[4] 20 U.S.C. § 1087-2(c)(1)(A). Of the fourteen board members elected by Sallie Mae shareholders, seven are to be affiliated with educational institutions, and seven are to be affiliated with financial institutions. *Id.*

[5] Sallie Mae is required to satisfy a capital requirement of two percent of assets. 20 U.S.C. § 1087-2(r)(4). This requirement is significantly less than the eight percent capital requirement that banks regulated by a Federal or State government agency must maintain and the capital amount (usually in excess of 8 percent) other financial institutions that participate in the FFEL Program must maintain to satisfy bond rating agencies. (Oxendine Decl. ¶ 5(c).)

requirements, and its federal charter exempts it from state and local taxes.[6]

As part of a privatization initiative, Sallie Mae has begun implementing an asset-backed securitization program. At oral argument, Plaintiff's counsel indicated that the program contemplates the securitization of approximately $2 billion in loans out of a portfolio of approximately $32 billion. The type of transaction proposed has been described as follows:

> "[Securitization] is a technique whereby income-producing assets, in most cases, illiquid, are pooled and converted into capital market instruments. In a typical financing, a sponsor transfers a pool of assets to a limited purpose entity, which in turn issues non-redeemable debt obligations or equity securities with debt-like characteristics. . . . Payment on the securities depends primarily on the cash flows generated by the pooled assets." SEC Exclusion From the Definition of Investment Company Act for Structured Financings, 17 C.F.R. § 270 (1992).

Under the terms of the proposed transaction, Sallie Mae will sell student loans to a wholly-owned subsidiary. The subsidiary will in turn establish a trust, organized for the dual purposes of financing the purchase of and holding the loans. The trust will finance 95 percent of the purchase price with the sale of debt securities to institutional investors. The remaining five percent of the capitalization will be in the form of equity certificates; four percent will be sold to institutional investors and one percent will be held by Sallie Mae as partial consideration for the transfer of the loans.

Sallie Mae would receive compensation for the sale of the loans in several forms: 1) the one percent equity interest referenced above; 2) a cash payment approximately equal to the principal and accrued interest on the loans sold; 3) de-

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[6] 20 U.S.C. § 1087-2(b)(2).

ferred purchase price payments equal to the cash flows of the trusts after certain costs; and 4) a residual interest in the trust upon its termination. In addition, Sallie Mae or one of its subsidiaries would continue to service the portfolio and receive a payment for that service.

On August 10, 1993, as part of its Omnibus Budget Reconciliation Act of 1993,[7] Congress enacted § 439(h)(7), the provision at issue in this case. This provision requires Sallie Mae to pay the Secretary of Education an offset fee on a monthly basis. The fee is calculated on an annual basis in an amount equal to 0.30 percent of the principal amount of each loan made, insured or guaranteed under the FFEL Program that Sallie Mae holds and that are acquired on or after August 10, 1993. 20 U.S.C. § 1087-2(h)(7)(A). No comparable fee is imposed on any other participant in the secondary market for student loans or the FFEL Program. The provision further requires that the Secretary of Education deposit the fees paid by Sallie Mae in the student loan insurance fund established under the HEA. 20 U.S.C. § 1081.

Following enactment of § 439(h)(7), representatives of Sallie Mae and the DOE had several discussions and exchanged letters regarding the applicability of the offset fee to funds transferred to a trust for purposes of securitization. Of particular importance to this action are two letters from DOE to Sallie Mae. The first letter, dated January 13, 1995, was written by DOE's Acting General Counsel and advised Sallie Mae that the agency took the position that student loans transferred to a business trust for purposes of securitization would be subject to the offset fee. In a second letter, dated March 16, 1995, DOE's Deputy General Counsel informed Sallie Mae of the agency's continued adherence to the view that Sallie Mae would be deemed to "hold" loans transferred to a trust for securitization for purposes of the offset fee provision.

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[7] Pub. L. 103-66, Title IV, Subtitle B.

On April 9, 1995, representatives of Sallie Mae's Board of Directors met with Defendant Richard Riley, Secretary of Education. At this meeting, the Secretary said he would not reverse the Department's stated position. Sallie Mae indicated that it was prepared to litigate the matter. Shortly thereafter, Sallie Mae filed this action.

SUMMARY JUDGMENT STANDARDS

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If a "motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In the first instance, the moving party must provide sufficient factual support that it is entitled to judgment as a matter of law by "identifying . . . portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Id.*

MOTION TO DISMISS STANDARDS

In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the Court must accept as true each of the allegations in the complaint. The motion should not be granted unless it appears that the plaintiff can prove no set of facts entitling him or her to the relief

sought in the complaint. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1977).

ANALYSIS

I. PLAINTIFF'S FACIAL CHALLENGE TO THE 30 BASIS POINT FEE

A. THE "TAKINGS" CLAIM

Jurisdiction

The threshold question is whether this Court has subject matter jurisdiction over Plaintiff's "takings claim." Defendant hinges its jurisdictional argument on the claim that the availability of compensation under the Tucker Act precludes the award of declaratory relief. Specifically, Defendant maintains that a request for declaratory relief for an unconstitutional taking of private property is inappropriate where the government has provided an adequate process for obtaining compensation.[8] Defendant claims that the government has provided an adequate process for obtaining compensation in this case: an action for damages under the Tucker Act, 28 U.S.C. § 1491(a)(1). Finally, Defendant argues that--since declaratory relief is inappropriate and the damages sought here exceed $10,000--this Court should decline jurisdiction in favor of the Court of Federal Claims. Defendant notes that the law of the D.C. Circuit is currently in flux over whether

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[8] Defendant cites several Supreme Court opinions in support of its argument. See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (stating that the Fifth Amendment is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"); *Williamson County Regional Planning Comm'n*, 473 U.S. 172 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

United States District Courts have jurisdiction over takings claims for compensation in excess of $10,000.[9]

The Defendant goes too far in suggesting that declaratory relief is never appropriate where the Plaintiff could seek compensation for an otherwise proper taking. It is true that declaratory judgment actions may not be appropriate in cases involving threatened seizures of real or other tangible property. *See Preseault v. ICC*, 494 U.S. 1 (1990) (precluding declaratory judgment actions if the property owner has not yet brought an action in the Court of Federal Claims for just compensation where the taking involved reversionary interests in land). However, where the threatened injury is a statutorily-mandated seizure of money, there is authority which makes clear that declaratory relief is available. *See, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1532-33 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

The distinction between real or intangible property on the one hand and money on the other hand is based on the idea that Congress would not have intended to create a situation where every dollar paid pursuant to a statute would generate one dollar of Tucker Act compensation. *See In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), *cert. denied*,133 L. Ed. 2d 204 (1995). To require continuous refund actions would be inefficient where, as here, statutory payments must be made on a monthly basis and actions to recoup those payments would have to be filed every time payments are made.

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[9] Compare *Transcapital Fin. Corp. v. Director, Office of Thrift Supervision*, 44 F.3d 1023, 1025 (D.C. Cir. 1995) (noting that district courts do not have such jurisdiction) *with A&S Council Oil Co., Inc. v. Lader*, 56 F.3d 234, 238 (D.C. Cir. 1995) (declining to reach the issue).

Because the takings claim at issue here involves the continuous seizure of money, declaratory relief is available, and the Court has jurisdiction to consider the constitutionality of the statute in question.

Plaintiff's Substantive Takings Claim

There is no "set formula" for determining whether a deprivation of property constitutes a "taking." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986). The Supreme Court has identified three factors to aid in consideration of a takings claim: (1) the character of the governmental action; (2) the action's economic impact; and (3) the action's interference with reasonable "investment-backed expectations." *Id.* at 225 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

In determining the character of the governmental action, the Supreme Court has stressed that an action is more likely to be a taking "when the interference with the property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (citations omitted).

In *Connolly*, the Supreme Court rejected a takings challenge to legislation that required private employers who chose to withdraw from multiemployer pension plans to pay a proportionate share of the relevant plan's unfunded but vested benefits in order to prevent the failure of the plans. *Connolly*, 475 U.S. at 215. This statutorily-imposed fee created a liability in excess of the limited liability expressly fixed by the pension plan agreements. *Id.* at 223. The Court held that the fee required of withdrawing employers adjusted private economic rights for the common good rather than appropriating fees for the government's own use, and therefore was not a wrongful "taking." *Id.* at 225.

Like the fee imposed in *Connolly*, the fee at issue here is an adjustment of private economic rights for the public good. The fees assessed against Sallie Mae contribute to an insurance fund which provides protection to owners of defaulted loans insured under the guaranteed loan program. Previously, payment of defaulted loans came directly from the U.S. Treasury. For more than 20 years, Sallie Mae has benefited from the federal guarantee of student loans. All that Congress has done with the HEA is to impose on Sallie Mae some of the burden for the benefit it has received for so long. As in *Connolly*, the fact that the burden was not imposed simultaneously with the benefit is not relevant.

Despite the clear link between the fee imposed and the benefits received, Sallie Mae characterizes the measure as a taking of private property done solely to reduce the federal deficit.[10] In support of its claim, Sallie Mae points to the physical location of the fee provision within the Budget Act, the recitation within the legislative history of the statute's purpose of "ensur[ing] compliance with . . . deficit reduction goals,"[11] and the absence of any specific declaration that the fee is intended to adjust benefits and burdens of economic life. Where the provision is placed in Congress's overall legislative program is immaterial. If the statute is lawful, it must be sustained. Under the act, the fee shifts some of the burden of insuring student loans from the general Treasury, and ultimately the American taxpayer, to the government entity which most directly benefits from the insurance fund. As

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[10] Sallie Mae argues that the Budget Act imposes a burden without granting any reciprocal benefit. This argument ignores the fact that the fee provision, although passed as part of the Budget Act, is an amendment to the HEA. As such, it would be inappropriate for this Court to view the burden of the fee in isolation from the benefits conferred by the HEA.

[11] H.R. Cong. Res. 64, 103d Cong., 1st Sess. § 12(a) (1993); 139 Cong. Rec. H1747, H1753 (daily ed. Mar. 31, 1993).

such, the fee adjusts burdens and benefits for the common good and is proper governmental action.

The action's economic impact does not support Plaintiff's claim that the fee is a taking in violation of the Fifth Amendment. There is no evidence that the costs imposed by the fee outweigh the benefits Sallie Mae has received and continues to receive from the government. As noted above, Sallie Mae receives substantial benefits from its status as a GSE, including: (1) exemption from state and local taxes,[12] (2) reduced interests rates, and (3) relaxed capital requirements.

Sallie Mae argues that, because its operations have always been conducted at no cost to the taxpayers, there is no obligation to the taxpayers to which the fee might be said to be proportional. The facts do not sustain Sallie Mae's claim that its operations do not rely in any way on taxpayer support. The provision of seed money at reduced interest rates, the insurance of loans held by Sallie Mae by U.S. Treasury funds, and Sallie Mae's tax-exempt status with respect to state and local taxes are all benefits conferred on Sallie Mae by the taxpayers.

Plaintiff's claim that the fee is a taking because it interferes with reasonable "investment-backed expectations" also fails. As the Supreme Court emphasized in *Connolly*, "'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent Amendments to achieve the legislative end.' " *Connolly*, 475 U.S. at 227 (*quoting FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958). Applying this principle, the *Connolly* Court concluded that, despite the specific provisions limiting liability, employers

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[12] Plaintiff responds that most of Sallie Mae's competitors are nonprofit or state-related entities that also operate under exemptions from state and local taxes. This argument misses the point. Unlike its competitors, were it not for the HEA, Sallie Mae -- a private, for-profit corporation -- would not otherwise satisfy the requirements for tax-exempt status.

were on notice that new obligations might be imposed by Congress. Here, too, Sallie Mae is a federally-chartered corporation, whose business is constrained by the legislation that brought it into existence. *See* 20 U.S.C. § 1087-2. As we in this nation are now experiencing, few if any congressionally-enacted programs are immune from curtailment or indeed outright abolishment. Since Sallie Mae is a federally created and regulated program, investors are on notice that new statutory obligations could be imposed at the will of Congress. As such, the imposition of the offset fee does not impermissibly interfere with investors' reasonable expectations.

In sum, after applying the three factors identified by the Supreme Court as relevant in making a takings determination, this Court finds that the imposition of the offset fee on loans held by Sallie Mae is not an uncompensated taking of Sallie Mae's property, and does not violate the Fifth Amendment.

B. THE EQUAL PROTECTION CLAIM

The final basis of Plaintiff's facial attack on the constitutionality of the fee provision is an equal protection claim, based on the Fifth Amendment. Specifically, Plaintiff claims that there is no rational basis for imposing the 30 basis point fee on Sallie Mae alone, and not also on other participants in the FFEL program. Sallie Mae, by virtue of its GSE status, is unique among the participants in the secondary market for student loans. Congress' determination that the benefits conferred on Sallie Mae by its GSE status warrant imposition of a fee to be contributed to the insurance fund for loans under the FFEL Program certainly meets the rational basis test. What is more, since Sallie Mae is a creation of the Congress, it can be abolished by Congress in whole or in part.

II. PLAINTIFF'S CHALLENGE TO THE 30 BASIS POINT FEE "AS APPLIED" TO SECURITIZED LOANS

Sallie Mae also challenges § 439(h)(7) as applied to the loans which Sallie Mae seeks to transfer to an independent trust. For the same reasons which the Court found the fee provision was facially valid, the Court also finds that the provision is not unconstitutional as applied to the securitized loans.

III. PLAINTIFF'S CHALLENGE TO THE DEPARTMENT OF EDUCATION'S INTERPRETATION OF THE BUDGET ACT TO REQUIRE PAYMENT OF THE 30 BASIS POINT FEE ON SECURITIZED LOANS

A. RIPENESS

DOE argues that Plaintiff's challenge to its determination that the offset fee provision encompasses transferred loans is neither "final agency action" under § 10 of the Administrative Procedures Act ("APA") nor ripe for review under general constitutional principles. Although the APA requirement of final agency action and the ripeness doctrine present overlapping issues, the question of final agency action is an independent jurisdictional requirement that must be satisfied before a court considers the issue of ripeness generally. *See Public Citizen v. Office of U.S. Trade Representatives,* 970 F.2d 916, 921 (D.C. Cir. 1992). Thus, the Court will first address the issue of finality under the APA.

APA Requirement of "Final Agency Action"

Federal court jurisdiction to review agency action depends on whether such action is merely a preliminary decision or a definitive ruling made by one with authority to bind the agency. Under the APA, federal courts have limited jurisdic-

tion to review "final agency action" for which there is no other adequate judicial remedy. 5 U.S.C. § 704. Conversely, when the agency position is tentative, the interest in postponing review is powerful. *See, e.g., Pub. Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984). "Once the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

In this case, Defendant argues that there is no final action because the letters from the General Counsel's Office represent mere advisory opinions of subordinate officials within the DOE. There is impressive authority for Defendant's legal assertion that opinions of subordinate, legal personnel within an agency are not reviewable "final agency action."[13]

Defendant's factual claim that the letters conveyed the opinion of the General Counsel's Office and not of the agency head belies the plain language of the letters. Indeed, the letters are replete with indications that the opinions conveyed were those of the Secretary of Education.[14] In addition, the

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[13] *See Am. Fed'n of Gov't Employees v. O'Connor*, 747 F.2d 748 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 909 (1985) (holding advice of Special Counsel did not bind the Merit Systems Protection Board); *Sabella v. United States*, 863 F. Supp. 1 (D.D.C. 1994) (holding a letter from the General Counsel of the National Oceanic and Atmospheric Administration setting forth her interpretation of a statute was not "final agency action").

[14] For example, the following are excerpts from the first letter from DOE to Sallie Mae:

> -"*The Secretary of Education* . . . believes that Sallie Mae's position is not supported by the law and expects Sallie Mae to pay the full amount of the fee due and owing under the law."
>
> -"*[T]he Secretary* believes it is appropriate to interpret the term "holds" to include any loan in which Sallie Mae holds a direct or indirect financial interest."

Secretary himself orally and unequivocally affirmed the opinion during his April 12, 1995 meeting with members of Sallie Mae's Board. (Arceneaux Aff.) Moreover, the letters contained no limitations nor any suggestion that the opinion was merely preliminary. *See Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 702 (D.C. Cir. 1971) (identifying one indicia of "final action" as the absence of language indicating the opinion is "tentative or otherwise qualified by arrangement for reconsideration").

In sum, while there are many occasions in which a letter from an agency's General Counsel Office will be merely a nonbinding advisory opinion, this is not one of those cases. Here, the letters unequivocally articulate the agency's view, clearly attribute the opinions to the Secretary, and bluntly demand that Sallie Mae comply with the Secretary's stated position. Thus, the Court finds the letters in issue to be "final agency action" within the meaning of § 10 of the APA, 5 U.S.C. § 704.

-"*[T]he Department's opinion* on this issue is based on our understanding of the securitization transactions contemplated by Sallie Mae as reflected above."

(Letter from Winnick to Greene of 1/13/95) (emphasis added).

In addition, the second letter -- which states "we have concluded that our initial view was correct and that the offset fee would be owed on loans transferred to a business trust" -- makes clear that the opinion was no longer merely an initial or preliminary opinion, but was a definitive decision made after careful reflection of the record. (Letter from Baxter to Greene of 3/16/95).

The General Requirement of Ripeness

Defendant also argues that, even if the letters from DOE's General Counsel Office are "final agency action", this Court should decline to exercise jurisdiction on general ripeness principles. The Court disagrees, and finds that the matters before it are ripe for decision.

Courts analyzing the ripeness of pre-enforcement agency action must consider "both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Factors relevant to the inquiry regarding fitness for judicial review include "whether the issue presented is a purely legal one, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Ciba-Geigy*, 801 F.2d at 435.

With respect to the first two elements of this test, DOE claims that judicial consideration would require determinations of fact and would benefit from a more concrete setting since the situation proposed by Sallie Mae is merely hypothetical. Sallie Mae is scheduled to undertake a pilot securitization program and, through a wholly-owned subsidiary, has filed a shelf registration statement with the Securities and Exchange Commission ("SEC").[15] The prospectus is consistent with the terms which Sallie Mae discussed with DOE, and describes the planned transaction in significant detail. Just as these facts were sufficiently concrete for the DOE to issue an opinion, so are they concrete enough for judicial review.

In evaluating the second element of the ripeness analysis--hardship to the parties of withholding judicial review--courts have considered whether an agency has "purport[ed] to

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[15] Indeed, subsequent to oral argument, Sallie Mae advised the Court that, on October 26, 1995, it completed the securitization of approximately $1 billion of student loans on substantially the same terms as set forth in its preliminary shelf registration statement.

give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business" of the party seeking review. *Abott Laboratories*, 387 U.S. at 152. Here, the DOE has made clear that it expects compliance with its ruling. In addition, applying the 30 basis point fee to loans transferred to an independent trust as part of Sallie Mae's securitiztion program could affect Sallie Mae's day-to-day business operations by jeopardizing the securitization program itself. At the very least, application of the fees would undermine the economic feasibility of the securitization program, which is an important part of Sallie Mae's efforts to privatize.[16]

Defendant seeks to differentiate this case from the facts presented in *Abott Laboratories* and *Ciba-Geigy*, which required plaintiffs to choose between implementing expensive compliance programs or facing serious civil and criminal penalties.[17] DOE argues that the agency action in this case does not require Plaintiff to go to great expense to conform its conduct to regulatory mandates but instead merely to continue the status quo.

Defendant's attempted distinction is overly technical. It is true that the facts here differ from those in *Abott Laboratories* and *Ciba-Geigy*. Nevertheless, the threatened harm here presents a compelling case for judicial review. Maintaining the status quo would cause Sallie Mae to forego an invest-

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[16] Sallie Mae believes the securitization program would demonstrate to the financial markets that Sallie Mae is capable of raising capital other than through the issuance of GSE debt obligations. (Overend Decl. ¶¶ 15, 16, 22). In addition, securitization provides Sallie Mae an off-balance sheet funding opportunity. (Overend Decl. ¶ 16).

[17] In *Ciba-Geigy*, the Environmental Protection Agency's interpretation of a particular statute required the Plaintiff to incur great expense to change the labeling of its registered pesticide or risk serious civil and criminal penalties. *Ciba-Geigy*, 801 F.2d 430. Similarly, in *Abbott Laboratories*, the Plaintiff had to choose between changing all their labels, advertisements and promotional materials for certain prescription drugs or risking serious criminal and civil penalties. *Abbott Laboratories*, 387 U.S. 153.

ment opportunity which has major implications for Sallie Mae's financial health. The securitization initiative would allow Sallie Mae to diversify sources of capital and, indeed, to identify new pools for investment. It would be manifestly unfair to hold Sallie Mae's transaction hostage to the Secretary's determination by precluding judicial review at this stage.

For the foregoing reasons -- and in view of guidance from this Circuit that on close questions of ripeness there is a "presumption of reviewability"[18] -- the Court holds that the controversy presented herein is ripe for judicial review.

B. DEFENDANT'S CLAIM THAT THE HEA BARS ISSUANCE OF DECLARATORY RELIEF

Defendant argues that the HEA expressly precludes the award of declaratory relief requested in this case. The HEA contains a limited waiver of sovereign immunity, allowing the Secretary to "sue and be sued" in connection with the FFEL Program, but prohibiting any "attachment, injunction, garnishment, or other similar process, mesne or final" to be issued against the Secretary. 20 U.S.C. § 1082(a)(2). Defendant claims that an adverse declaratory ruling in this action would have the effect of an injunction precluding the agency from acting on the opinion set forth in the letters from the General Counsel's Office, and hence is barred by the anti-injunction provision of the HEA.

There is substantial authority holding that anti-injunction clauses do not preclude consideration of requests for declaratory relief. *See, e.g., Thomas v. Bennett*, 856 F.2d 1165, 1167 (8th Cir. 1988) (the district court could properly consider plaintiff's claim for declaratory relief despite anti-injunction language of § 1082(a)(2) of the HEA); *Pro Schools, Inc. v.*

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[18] *Ciba-Geigy Corp.*, 801 F.2d at 434.

Riley, 824 F. Supp. 1314, 1315-16 (E.D. Wis. 1993) (allowing plaintiff to file an amended complaint seeking declaratory relief for alleged violations of the HEA after claims for injunctive relief were dismissed). Plaintiff's challenge to the Secretary's interpretation is brought under the APA,[19] and courts have held that the anti-injunction clause of § 1082(a)(2) does not preclude relief for APA claims. *See, e.g., Canterbury Career School, Inc. v. Riley*, 833 F. Supp. 1097, 1102-03 (D.N.J. 1993); *Int'l Dealers School, Inc. v. Riley*, 840 F. Supp. 748, 749-50 (D. Nev. 1993).

Accordingly, the Court finds that the HEA does not preclude award of declaratory relief, should the facts warrant.

C. PLAINTIFF'S CLAIM THAT THE SECRETARY ACTED ARBITRARILY AND CAPRICIOUSLY IN INTERPRETING THE BUDGET ACT TO REQUIRE PAYMENT OF THE 30 BASIS POINT FEE ON SECURITIZED LOANS

Sallie Mae contends that the Department of Education acted arbitrarily and capriciously in advising Sallie Mae that the offset fee would apply to loans involved in its proposed securitization program.

Standard for Judicial Review of Agency Action

In reviewing an agency's interpretation of the laws it administers, this Court must first look to the plain language of the statute. *Chevron, USA., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843 (1984). Absent a

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[19] The APA -- the statute under which Plaintiff challenges the Secretary's application of the 30 basis point fee to securitized loans -- waives sovereign immunity for actions "seeking relief other than money damages and stating a claim that an agency or an officer . . . thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

clearly expressed legislative intent to the contrary, the plain language of the statute "must ordinarily be regarded as conclusive" *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Agency action must be set aside if it is "arbitrary, capricious, or an abuse of discretion." *Motor Vehicle Mfrs. Ass'n of U.S. v. EPA* 768 F.2d 385, 389 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). If a statute is silent or ambiguous on a point, substantial deference must be given to the interpretation of that statute by the agency that is responsible for its implementation. The interpretation given by the agency need not be the only interpretation possible as long as it is a reasonable one. *Chevron*, 467 U.S. 842-45. A reviewing court should not defer to an agency position which is contrary to unambiguous Congressional intent. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).

Discussion

The amendment to the HEA provides, in relevant part:

> The Association shall pay to the Secretary, on a monthly basis, an offset fee calculated on an annual basis in an amount equal to 0.30 percent of the principal amount of each loan made, insured or guaranteed under this part that the Association holds . . . and that was acquired on or after August 10, 1993.

20 U.S.C. § 1087-2(h)(7)(A).

The statute does not contain a definition of the word "holds." Plaintiff argues that the Court must adopt the definition of "holder" that appears elsewhere in the statute. 20 U.S.C. § 1085(i) defines "holder" as "an eligible lender who owns a loan."

The government states that reliance on the term "holder" is misplaced. Specifically, DOE argues that, because the assessment in question applies only to Sallie Mae, the term "holds" must be interpreted on its own terms.

Generally, the same terms used in different sections of the statute have the same meaning. *See, e.g., Sullivan v. Stroop*, 496 U.S. 478 (1990). Nothing in the record suggests a compelling reason for reading § 1085(i) and § 1087-2(h)(7)(A) differently.

"[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. The Court will not extrapolate a definition when one has been provided in the text of the statute. The Court finds that for determining who "holds" a loan for purposes of the special assessment, one must look to the definition of "holder".

Adopting the statutory definition of "holds," it is apparent that after executing the proposed transaction, Sallie Mae will no longer "own" the loans. *See* 20 U.S.C. § 1085(i). All major indicia of ownership will be ceded by Sallie Mae upon the transfer. Sallie Mae's voting rights will be diluted to that of a one percent equity holder; and Sallie Mae will treat the transfer of the loans as a sale for purposes of Generally Accepted Accounting Principles and for purposes of income tax reporting. Finally, the loans will cease to appear on Sallie Mae's balance sheet for corporate reporting purposes.

The Secretary's determination seems to be premised on the basis that the loans sold to the trust are to be attributed to Sallie Mae and be deemed to be held by it. Clearly, if Sallie Mae sold outright a percentage of the loans held in its portfolio to third parties, it would be inconceivable that the Secretary would seek to impose a fee with respect to those loans. Even if Sallie Mae continued to service those loans, the result should be the same. In essence, what seems to be the principal basis for the Secretary's position is the 1 percent ownership interest that Sallie Mae has in the Trust. This small ownership interest does not establish a logical basis to subject the trust's entire loan portfolio to the congressionally mandated fee.

Innovation is one of the hallmarks of our dynamic free market system. Here Sallie Mae is trying a market experiment. There are sufficient non-fee avoidance reasons for Sallie Mae

to be embarking on its privatization program. To stymie it by an expansive interpretation of a statute that does not specifically cover the proposed transaction would be another example of excessive and mischievous federal regulation.

This decision is premised on the good faith representations of Plaintiff's counsel that the securitization transactions at issue here represent innovative financing activity rather than mere fee avoidance. This Court has no desire to create a "Northwest Passage" around the offset fee. The Court's analysis is based upon the representations of Plaintiff's counsel that only a small portion of the total Sallie Mae portfolio of student loans will eventually be securitized. Certainly the Secretary has the authority to closely scrutinize and monitor the program. If he should find that the securitization program is an attempt at fee avoidance, he has the choice to seek remedial court action or relief from the legislature.

CONCLUSION

For the reasons stated above, the Court finds that jurisdiction is proper in this case. The Court further finds that 20 U.S.C. § 1087-2(h)(7)(A) does not effect an uncompensated taking of private property nor violate Plaintiff's equal protection rights. In view of the clear statutory definition of "holder," the Court finds that it was arbitrary and capricious and an abuse of discretion to interpret § 1087(h)(7)(A) to require Sallie Mae to pay the 30 basis point fee on loans sold to an independent trust under the securitization transaction program.

An appropriate order accompanies this memorandum opinion.

DATE: 11/15/95

/s/ Stanley Sporkin
STANLEY SPORKIN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 95-717
(Stanley Sporkin)

STUDENT LOAN MARKETING ASSOCIATION,
Plaintiff,

v.

RICHARD RILEY,
Secretary of the United States
Department of Education,
Defendant.

ORDER

This matter comes before the Court on cross-motions for summary judgment. The Court finds that jurisdiction is proper in this case. The Court further finds that 20 U.S.C. § 1087-2(h)(7)(A) does not effect an uncompensated taking of private property nor deny equal protection under the Fifth Amendment. Finally, in view of the clear statutory definition of "holder," the Court finds that it was arbitrary and capricious to interpret § 1087(h)(7)(A) to require Sallie Mae to pay the 30 basis point fee on loans transferred to an independent trust under the securitization transaction described above.

Accordingly, the Court hereby **ORDERS** that Plaintiff's motion for summary judgment is **GRANTED** in part, and **DENIED** in part. The Court further **ORDERS** that the Defendant's motion for summary judgment is **GRANTED** in part, and **DENIED** in part.

DATE: 11/15/95

/s/ Stanley Sporkin
STANLEY SPORKIN
UNITED STATES
DISTRICT JUDGE

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

20 U.S.C. § 1081 (1994)

§ 1081. Insurance fund

(a) Establishment

There is hereby established a student loan insurance fund (hereinafter in this section called the "fund") which shall be available without fiscal year limitation to the Secretary for making payments in connection with the default of loans insured by the Secretary under this part, or in connection with payments under a guaranty agreement under section 1078(c) of this title. All amounts received by the Secretary as premium charges for insurance and as receipts, earnings, or proceeds derived from any claim or other assets acquired by the Secretary in connection with operations under this part, any excess advances under section 1072 of this title, and any other moneys, property, or assets derived by the Secretary from operations in connection with this section, shall be deposited in the fund. All payments in connection with the default of loans insured by the Secretary under this part, or in connection with such guaranty agreements shall be paid from the fund. Moneys in the fund not needed for current operations under this section may be invested in bonds or other obligations guaranteed as to principal and interest by the United States.

(b) Borrowing authority

If at any time the moneys in the fund are insufficient to make payments in connection with the default of any loan insured by the Secretary under this part, or in connection with any guaranty agreement made under section 1078(c) of this title, the Secretary is authorized, to the extent provided in advance by appropriations Acts, to issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary with the approval of the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by

the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury is authorized and directed to purchase any notes and other obligations issued hereunder and for that purpose is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under that chapter, are extended to include any purchase of such notes and obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States. Sums borrowed under the subsection shall be deposited in the fund and redemption of such notes and obligations shall be made by the Secretary from such fund.

20 U.S.C. § 1087-2 (1994)

§ 1087-2. Student Loan Marketing Association

(a) Purpose

The Congress hereby declares that it is the purpose of this section (1) to establish a private corporation which will be financed by private capital and which will serve as a secondary market and warehousing facility for student loans, including loans which are insured by the Secretary under this part or by a guaranty agency, and which will provide liquidity for student loan investments; (2) in order to facilitate secured transactions involving student loans, to provide for perfection of security interests in student loans either through the taking of possession or by notice filing; and (3) to assure nationwide the establishment of adequate loan insurance programs for students, to provide for an additional program of loan insurance to be covered by agreements with the Secretary.

(b) Establishment

(1) In general

There is hereby created a body corporate to be known as the Student Loan Marketing Association (hereinafter referred to as the "Association"). The Association shall have succession until dissolved. It shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue and jurisdiction in civil actions, to be a resident and citizen thereof. Offices may be established by the Association in such other place or places as it may deem necessary or appropriate for the conduct of its business.

(2) Exemption from State and local taxes

The Association, including its franchise, capital, reserves, surplus, mortgages, or other security holdings, and income shall be exempt from all taxation now or hereafter imposed by any State, territory, possession, Commonwealth, or dependency of the United States, or by the District of Columbia, or by

any county, municipality, or local taxing authority, except that any real property of the Association shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

(3) Appropriations authorized for establishment

There is hereby authorized to be appropriated to the Secretary $5,000,000 for making advances for the purpose of helping to establish the Association. Such advances shall be repaid within such period as the Secretary may deem to be appropriate in light of the maturity and solvency of the Association. Such advances shall bear interest at a rate not less than (A) a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining period to maturity comparable to the maturity of such advances, adjusted to the nearest one-eighth of 1 percent, plus (B) an allowance adequate in the judgment of the Secretary to cover administrative costs and probable losses. Repayments of such advances shall be deposited into miscellaneous receipts of the Treasury.

(c) Board of Directors

(1) Composition of Board: Chairman

(A) The Association shall have a Board of Directors which shall consist of 21 persons, 7 of whom shall be appointed by the President and shall be representative of the general public. The remaining 14 directors shall be elected by the common stockholders of the Association entitled to vote pursuant to subsection (f) of this section. Commencing with the annual shareholders meeting to be held in 1993—

(i) 7 of the elected directors shall be affiliated with an eligible institution; and

(ii) 7 of the elected directors shall be affiliated with an eligible lender.

(B) The President shall designate 1 of the directors to serve as Chairman.

(2) Terms of appointed and elected members

The directors appointed by the President shall serve at the pleasure of the President and until their successors have been appointed and have qualified. The remaining directors shall each be elected for a term ending on the date of the next annual meeting of the common stockholders of the Association, and shall serve until their successors have been elected and have qualified. Any appointive seat on the Board which becomes vacant shall be filled by appointment of the President. Any elective seat on the Board which becomes vacant after the annual election of the directors shall be filled by the Board, but only for the unexpired portion of the term.

(3) Affiliated members

For the purpose of this subsection, the references to a director "affiliated with the eligible institution" or a director "affiliated with an eligible lender" means an individual who is, or within 5 years of election to the Board has been, an employee, officer, director, or similar official of—

(A) an eligible institution or an eligible lender;

(B) an association whose members consist primarily of eligible institutions or eligible lenders; or

(C) a State agency, authority, instrumentality, commission, or similar institution, the primary purpose of which relates to educational matters or banking matters.

(4) Meetings and functions of the Board

The Board of Directors shall meet at the call of its Chairman, but at least semiannually. The Board

shall determine the general policies which shall govern the operations of the Association. The Chairman of the Board shall, with the approval of the Board, select, appoint, and compensate qualified persons to fill the offices as may be provided for in the bylaws, with such functions, powers, and duties as may be prescribed by the bylaws or by the Board of Directors, and such persons shall be the officers of the Association and shall discharge all such functions, powers, and duties.

(d) Authority of Association

(1) In general

The Association is authorized, subject to the provisions of this section—

(A) pursuant to commitments or otherwise to make advances on the security of, purchase, or repurchase, service, sell or resell, offer participations, or pooled interests or otherwise deal in, at prices and on terms and conditions determined by the Association, student loans which are insured by the Secretary under this part or by a guaranty agency;

(B) to buy, sell, hold, underwrite, and otherwise deal in obligations, if such obligations are issued, for the purpose of making or purchasing insured loans, by a guaranty agency or by an eligible lender in a State described in section 1085(d)(1)(D) or (F) of this title;

(C) to buy, sell, hold, insure, underwrite, and otherwise deal in obligations issued for the purpose of financing or refinancing the construction, reconstruction, renovation, improvement, or purchase at institutions of higher education of any of the following facilities (including the underlying property) and materials (including related equipment, instrumentation, and furnishings) at an eligible institution of higher education:

(i) educational and training facilities;

(ii) housing for students and faculties, dining halls, student unions, and facilities specifically designed to promote fitness and health for students, faculty, and staff or for physical education courses; and

(iii) library facilities, including the acquisition of library materials at institutions of higher education;

except that not more than 30 percent of the value of transactions entered into under this subparagraph shall involve transactions of the types described in clause (ii);

(D) to undertake a program of loan insurance pursuant to agreements with the Secretary under section 1078 of this title, and except with respect to loans under subsection (o) of this section or under section 1078-3 of this title, the Secretary may enter into an agreement with the Association for such purpose only if the Secretary determines that (i) eligible borrowers are seeking and unable to obtain loans under this part, and (ii) no guaranty agency is capable of or willing to provide a program of loan insurance for such borrowers; and

(E) to undertake any other activity which the Board of Directors of the Association determines to be in furtherance of the programs of insured student loans authorized under this part or will otherwise support the credit needs of students, except that—

(i) in carrying out all such activities the purpose shall always be to provide secondary market and other support for lending programs offered by other organizations and not to replace or compete with such other programs;

(ii) nothing in this subparagraph (E) shall be deemed to authorize the Association to acquire, own, operate, or control any bank, savings and loan association, savings bank or credit union; and

(iii) not later than 30 days prior to the initial implementation of a program undertaken pursuant to this subparagraph (E), the Association shall advise the Chairman and the Ranking Member on the Committee on Labor and Human Resources of the Senate and the Chairman and the Ranking Member of the Committee on Education and Labor of the House of Representatives in writing of its plans to offer such program and shall provide information relating to the general terms and conditions of such program.

The Association is further authorized to undertake any activity with regard to student loans which are not insured or guaranteed as provided for in this subsection as it may undertake with regard to insured or guaranteed student loans. Any warehousing advance made on the security of such loans shall be subject to the provisions of paragraph (3) of this subsection to the same extent as a warehousing advance made on the security of insured loans.

(2) Warehousing advances

Any warehousing advance made under paragraph (1)(A) of this subsection shall be made on the security of (A) insured loans, (B) marketable obligations and securities issued, guaranteed, or insured by, the United States, or for which the full faith and credit of the United States is pledged for the repayment of principal and interest thereof, or (C) marketable obligations issued, guaranteed, or insured by any agency, instrumentality, or corporation of the United States for

which the credit of such agency, instrumentality, or corporation is pledged for the repayment of principal and interest thereof, in an amount equal to the amount of such advance. The proceeds of any such advance secured by insured loans shall either be invested in additional insured loans or the lender shall provide assurances to the Association that during the period of the borrowing it will maintain a level of insured loans in its portfolio not less than the aggregate outstanding balance of such loans held at the time of the borrowing. The proceeds from any such advance secured by collateral described in clauses (B) and (C) shall be invested in additional insured student loans.

(3) Perfection of security interests in student loans

Notwithstanding the provisions of any State law to the contrary, including the Uniform Commercial Code as in effect in any State, a security interest in insured student loans created on behalf of the Association or any eligible lender as defined in section 1085(a) of this title may be perfected either through the taking of possession of such loans or by the filing of notice of such security interest in such loans in the manner provided by such State law for perfection of security interests in accounts.

(4) Form of securities

Securities issued pursuant to the offering of participations or pooled interests under paragraph (1) of this subsection may be in the form of debt obligations, or trust certificates of beneficial ownership, or both. Student loans set aside pursuant to the offering of participations or pooled interests shall at all times be adequate to ensure the timely principal and interest payments on such securities.

(5) Restrictions on facilities and housing activities

Not less than 75 percent of the aggregate dollar amount of obligations bought, sold, held, insured, underwritten, and otherwise supported in accordance

with the authority contained in paragraph (1)(C) shall be obligations which are listed by a nationally recognized statistical rating organization at a rating below the second highest rating of such organization.

(e) Advances to lenders that do not discriminate

The Association, pursuant to such criteria as the Board of Directors may prescribe, shall make advances on security or purchase student loans pursuant to subsection (d) of this section only after the Association is assured that the lender (1) does not discriminate by pattern or practice against any particular class or category of students by requiring that, as a condition to the receipt of a loan, the student or his family maintain a business relationship with the lender, except that this clause shall not apply in the case of a loan made by a credit union, savings and loan association, mutual savings bank, institution of higher education, or any other lender with less than $75,000,000 in deposits, and (2) does not discriminate on the basis of race, sex, color, creed, or national origin.

(f) Stock of the Association

(1) Voting common stock

The Association shall have voting common stock having such par value as may be fixed by its Board of Directors from time to time. Each share of voting common stock shall be entitled to one vote with rights of cumulative voting at all elections of directors.

(2) Number of shares; transferability

The maximum number of shares of voting common stock that the Association may issue and have outstanding at any one time shall be fixed by the Board of Directors from time to time. Any voting common stock issued shall be fully transferable, except that, as to the Association, it shall be transferred only on the books of the Association.

(3) Dividends

To the extent that net income is earned and realized, subject to subsection (g)(2) of this section,

dividends may be declared on voting common stock by the Board of Directors. Such dividends as may be declared by the Board of Directors shall be paid to the holders of outstanding shares of voting common stock, except that no such dividends shall be payable with respect to any share which has been called for redemption past the effective date of such call.

(4) Single class of voting common stock

As of the effective date of the Higher Education Amendments of 1992, all of the previously authorized shares of voting common stock and nonvoting common stock of the Association shall be converted to shares of a single class of voting common stock on a share-for-share basis, without any further action on the part of the Association or any holder. Each outstanding certificate for voting or nonvoting common stock shall evidence ownership of the same number of shares of voting stock into which it is converted. All preexisting rights and obligations with respect to any class of common stock of the Association shall be deemed to be rights and obligations with respect to such converted shares.

(g) Preferred stock

(1) Authority of Board

The Association is authorized to issue nonvoting preferred stock having such par value as may be fixed by its Board of Directors from time to time. Any preferred share issued shall be freely transferable, except that, as to the Association, it shall be transferred only on the books of the Association.

(2) Rights of preferred stock

The holders of the preferred shares shall be entitled to such rate of cumulative dividends and such shares shall be subject to such redemption or other conversion provisions as may be provided for at the time of issuance. No dividends shall be payable on any share of common stock at any time when any

dividend is due on any share of preferred stock and has not been paid.

(3) Preference on termination of business

In the event of any liquidation, dissolution, or winding up of the Association's business, the holders of the preferred shares shall be paid in full at par value thereof, plus all accrued dividends, before the holders of the common shares receive any payment.

(h) Debt obligations

(1) Approval by Secretaries of Education and the Treasury

The Association is authorized with the approval of the Secretary of Education and the Secretary of the Treasury to issue and have outstanding obligations having such maturities and bearing such rate or rates of interest as may be determined by the Association. The authority of the Secretary of Education to approve the issuance of such obligations is limited to obligations issued by the Association and guaranteed by the Secretary pursuant to paragraph (2) of this subsection. Such obligations may be redeemable at the option of the Association before maturity in such manner as may be stipulated therein. The Secretary of the Treasury may not direct as a condition of his approval that any such issuance of obligations by the Association be made or sold to the Federal Financing Bank. To the extent that the average outstanding amount of the obligations owned by the Association pursuant to the authority contained in subsection (d)(1)(B) and (C) of this section and as to which the income is exempt from taxation under title 26 does not exceed the average stockholders' equity of the Association, the interest on obligations issued under this paragraph shall not be deemed to be interest on indebtedness incurred or continued to purchase or carry obligations for the purpose of section 265 of title 26.

(2) Guarantee of debt

The Secretary is authorized, prior to October 1, 1984, to guarantee payment when due of principal and interest on obligations issued by the Association in an aggregate amount determined by the Secretary in consultation with the Secretary of the Treasury. Nothing in this section shall be construed so as to authorize the Secretary of Education or the Secretary of the Treasury to limit, control, or constrain programs of the Association or support of the Guaranteed Student Loan Program by the Association.

(3) Borrowing authority to meet guarantee obligations

To enable the Secretary to discharge his responsibilities under guarantees issued by him, he is authorized to issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions, as may be prescribed by the Secretary with the approval of the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the months preceding the issuance of the notes or other obligations. The Secretary of the Treasury is authorized and directed to purchase any notes and other obligations issued hereunder and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under that chapter are extended to include any purchase of such notes and obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him un-

der this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States. There is authorized to be appropriated to the Secretary such sums as may be necessary to pay the principal and interest on the notes or obligations issued by him to the Secretary of the Treasury.

(4) Action on request for guarantees

Upon receipt of a request from the Association under this subsection requiring approvals by the Secretary of Education or the Secretary of the Treasury, the Secretary of Education or the Secretary of the Treasury shall act promptly either to grant approval or to advise the Association of the reasons for withholding approval. In no case shall such an approval be withheld for a period longer than 60 days unless, prior to the end of such period, the Secretary of Education and the Secretary of the Treasury submit to the Congress a detailed explanation of reasons for doing so.

(5) Authority of Treasury to purchase debt

The Secretary of the Treasury is authorized to purchase any obligations issued by the Association pursuant to this subsection as now or hereafter in force, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds of the sale of any securities hereafter issued under chapter 31 of title 31, as now or hereafter in force, and the purposes for which securities may be issued under chapter 31 of title 31, as now or hereafter in force are extended to include such purchases. The Secretary of the Treasury shall not at any time purchase any obligations under this subsection if such purchase would increase the aggregate principal amount of his then outstanding holdings of such obligations under this subsection to an amount greater

than $1,000,000,000. Each purchase of obligations by the Secretary of the Treasury under this subsection shall be upon such terms and conditions as to yield a return at a rate determined by the Secretary of the Treasury, taking into consideration the current average rate on outstanding marketable obligations of the United States of comparable maturities as of the last day of the month preceding the making of such purchase. The Secretary of the Treasury may, at any time, sell, upon such terms and conditions and at such price or prices as he shall determine, any of the obligations acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such obligations under this subsection shall be treated as public debt transactions of the United States.

(6) Sale of debt to Federal Financing Bank

Notwithstanding any other provision of law the Association is authorized to sell or issue obligations on the security of student loans, the payment of interest or principal of which has at any time been guaranteed under section 1078 or 1079 of this title, to the Federal Financing Bank.

(7) Offset fee

(A) The Association shall pay to the Secretary, on a monthly basis, an offset fee calculated on an annual basis in an amount equal to 0.30 percent of the principal amount of each loan made, insured or guaranteed under this part that the Association holds (except for loans made pursuant to section 1078-3 of this title, subsection (o) of this section, or subsection (q) of this section) and that was acquired on or after August 10, 1993.

(B) If the Secretary determines that the Association has substantially failed to comply with subsection (q) of this section, subparagraph (A) shall be applied by substituting "1.0 percent" for "0.3 percent".

(C) The Secretary shall deposit all fees collected pursuant to this paragraph into the insurance fund established in section 1081 of this title.

(i) General corporate powers

The Association shall have power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel;

(2) to adopt, alter, and use the corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal by its Board of Directors, bylaws, rules, and regulations as may be necessary for the conduct of its business;

(4) to conduct its business, carry on its operations, and have officers and exercise the power granted by this section in any State without regard to any qualification or similar statute in any State;

(5) to lease, purchase, or otherwise acquire, own, hold, improve, use, or otherwise deal in and with any property, real, personal, or mixed, or any interest therein, wherever situated;

(6) to accept gifts or donations of services, or of property, real, personal, or mixed, tangible or intangible, in aid of any of the purposes of the Association;

(7) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of its property and assets;

(8) to appoint such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, to fix their salaries, require bonds for them, and fix the penalty thereof; and

(9) to enter into contracts, to execute instruments, to incur liabilities, and to do all things as are necessary or incidental to the proper management of its affairs and the proper conduct of its business.

(j) Accounting, auditing, and reporting

The accounts of the Association shall be audited annually. Such audits shall be conducted in accordance with generally accepted auditing standards by independent certified public accountants or by independent licensed public accountants, licensed on or before December 31, 1970, who are certified or licensed by a regulatory authority of a State or other political subdivision of the United States, except that independent public accountants licensed to practice by such regulatory authority after December 31, 1970, and persons who, although not so certified or licensed, meet, in the opinion of the Secretary, standards of education and experience representative of the highest standards prescribed by the licensing authorities of the several States which provide for the continuing licensing of public accountants and which are prescribed by the Secretary in appropriate regulations may perform such audits until December 31, 1975. A report of each such audit shall be furnished to the Secretary of the Treasury. The audit shall be conducted at the place or places where the accounts are normally kept. The representatives of the Secretary shall have access to all books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Association and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians.

(k) Report on audits by Treasury

A report of each such audit for a fiscal year shall be made by the Secretary of the Treasury to the President and to the Congress not later than 6 months following the close of such fiscal year. The report shall set forth the scope of the audit and shall include a statement (showing intercorporate relations) of assets and liabilities, capital and surplus or deficit; a statement of surplus or deficit analysis; a statement of income and expense; a statement of sources and application of funds; and such comments and information as may be deemed necessary to keep the President and the Congress informed of

the operations and financial condition of the Association, together with such recommendations with respect thereto as the Secretary may deem advisable, including a report of any impairment of capital or lack of sufficient capital noted in the audit. A copy of each report shall be furnished to the Secretary, and to the Association.

(l) Lawful investment instruments; effect of and exemptions from other laws

All obligations issued by the Association including those made under subsection (d)(4) of this section shall be lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under authority or control of the United States or of any officer or officers thereof. All stock and obligations issued by the Association pursuant to this section shall be deemed to be exempt securities within the meaning of laws administered by the Securities and Exchange Commission, to the same extent as securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States. The Association shall, for the purposes of section 355(2) of title 12, be deemed to be an agency of the United States. The obligations of the Association shall be deemed to be obligations of the United States for the purpose of section 3124 of title 31. For the purpose of the distribution of its property pursuant to section 726 of title 11, the Association shall be deemed a person within the meaning of such title. The priority established in favor of the United States by section 3713 of title 31 shall not establish a priority over the indebtedness of the Association issued or incurred on or before September 30, 1992. The Federal Reserve Banks are authorized to act as depositaries, custodians, or fiscal agents, or a combination thereof, for the Association in the general performance of its powers under this section.

(m) Preparation of obligations

In order to furnish obligations for delivery by the Association, the Secretary of the Treasury is authorized to prepare such obligations in such form as the Board of Directors

may approve, such obligations when prepared to be held in the Treasury subject to delivery upon order by the Association. The engraved plates, dies, bed pieces, and so forth, executed in connection therewith shall remain in the custody of the Secretary of the Treasury. The Association shall reimburse the Secretary of the Treasury for any expenditures made in the preparation, custody, and delivery of such obligations. The Secretary of the Treasury is authorized to promulgate regulations on behalf of the Association so that the Association may utilize the book-entry system of the Federal Reserve Banks.

(n) Report on operations and activities

The Association shall, as soon as practicable after the end of each fiscal year, transmit to the President and the Congress a report of the Association's operations and activities, including a report with respect to all facilities transactions, during each year.

(o) Loan consolidations

(1) In general

The Association or its designated agent may, upon request of a borrower, consolidate loans received under this subchapter and part C of subchapter I of chapter 34 of title 42 in accordance with section 1078-3 of this title.

(2) Use of existing agencies as agent

The Association in making loans pursuant to this subsection in any State served by a guaranty agency or an eligible lender in a State described in section 1085(d)(1)(D) or (F) of this title may designate as its agent such agency or lender to perform such functions as the Association determines appropriate. Any agreements made pursuant to this subparagraph shall be on such terms and conditions as agreed upon by the Association and such agency or lender.

(p) Advances for direct loans by guaranty agencies

(1) In general

The Association shall make advances in each fiscal year from amounts available to it to each guaranty agency and eligible lender described in subsection 1078(h)(1) of this title which has an agreement with the Association which sets forth that advances are necessary to enable such agency or lender to make student loans in accordance with section 1078(h) of this title and that such advances will be repaid to the Association in accordance with such terms and conditions as may be set forth in the agreement and agreed to by the Association and such agency or lender. Advances made under this subsection shall not be subject to subsection (d)(2) of this section.

(2) Limitation

No advance may be made under this subsection unless the guaranty agency or lender makes an application to the Association, which shall be accompanied by such information as the Association determines to be reasonably necessary.

(q) Lender-of-last-resort

(1) Action at request of Secretary

(A) Whenever the Secretary determines that eligible borrowers are seeking and are unable to obtain loans under this part, the Association or its designated agent shall, not later than 90 days after August 10, 1993, begin making loans to such eligible borrowers in accordance with this subsection at the request of the Secretary. The Secretary may request that the Association make loans to borrowers within a geographic area or for the benefit of students attending institutions of higher education that certify, in accordance with standards established by the Secretary, that their students are seeking and unable to obtain loans.

(B) Loans made pursuant to this subsection shall be insurable by the Secretary under section 1079 of this title with a certificate of comprehensive insurance coverage provided for under section 1079(b)(1) of this title or by a guaranty agency under paragraph (2)(A) of this subsection.

(2) Issuance and coverage of loans

(A) Whenever the Secretary, after consultation with, and with the agreement of, representatives of the guaranty agency in a State, or an eligible lender in a State described in section 1085(d)(1)(D) of this title, determines that a substantial portion of eligible borrowers in such State or within an area of such State are seeking and are unable to obtain loans under this part, the Association or its designated agent shall begin making such loans to borrowers in such State or within an area of such State in accordance with this subsection at the request of the Secretary.

(B) Loans made pursuant to this subsection shall be insurable by the agency identified in subparagraph (A) having an agreement pursuant to section 1078(b) of this title. For loans insured by such agency, the agency shall provide the Association with a certificate of comprehensive insurance coverage, if the Association and the agency have mutually agreed upon a means to determine that the agency has not already guaranteed a loan under this part to a student which would cause a subsequent loan made by the Association to be in violation of any provision under this part.

(3) Termination of lending

The Association or its designated agent shall cease making loans under this subsection at such time as the Secretary determines that the conditions which caused the implementation of this subsection have ceased to exist.

(r) Safety and soundness of Association

(1) Reports by the Association

The Association shall promptly furnish to the Secretary of Education and Secretary of the Treasury copies of all—

(A) periodic financial reports publicly distributed by the Association; and

(B) reports concerning the Association that are received by the Association and prepared by nationally recognized statistical rating organizations.

(2) Audit by Secretary of the Treasury

(A) The Secretary of the Treasury may—

(i) appoint auditors to conduct audits of the Association from time to time to determine the condition of the Association for the purpose of assessing its financial safety and soundness; and

(ii) enter into contracts to obtain the services of such technical experts as the Secretary of the Treasury determines necessary and appropriate to provide technical assistance to any auditor appointed under this paragraph.

(B) Each auditor appointed under this paragraph shall conduct an audit of the Association to the extent requested by the Secretary of the Treasury and shall prepare and submit a report to the Secretary of the Treasury concerning the results of such audit. A copy of such report shall be furnished to the Association and the Secretary of Education on the date on which it is delivered to the Secretary of the Treasury.

(C) The Association shall provide full and prompt access to the Secretary of the Treasury to its books and records and other information requested by the Secretary of the Treasury.

(3) Monitoring of safety and soundness

The Secretary of the Treasury shall conduct such studies as may be necessary to monitor the financial safety and soundness of the Association. In the event that the Secretary of the Treasury determines that the financial safety and soundness of the Association is at risk, the Secretary of the Treasury shall inform the Chairman and ranking minority member of the Committee on Labor and Human Resources of the Senate, the Chairman and ranking minority member of the Committee on Education and Labor of the House of Representatives, and the Secretary of Education of such determination and identify any corrective actions that should be taken to ensure the safety and soundness of the Association.

(4) Capital standard

If the capital ratio is less than 2 percent and is greater than or equal to 1.75 percent at the end of the Association's most recent calendar quarter the Association shall, within 60 days of such occurrence, submit to the Secretary of the Treasury a capital restoration plan, in reasonable detail, that the Association believes is adequate to cause the capital ratio to equal or exceed 2 percent within 36 months.

(5) Capital restoration plan

(A) Submission, approval, and implementation.

The Secretary of the Treasury and the Association shall consult with respect to any capital restoration plan submitted pursuant to paragraph (4) and the Secretary of the Treasury shall approve such plan (or a modification thereof accepted by the Association) or disapprove such plan within 30 days after such plan is first submitted to the Secretary of the Treasury by the Association, unless the Association and Secretary of the Treasury mutually agree to a longer consideration period. If the Secretary of the

Treasury approves a capital restoration plan (including a modification of a plan accepted by the Association), the Association shall forthwith proceed with diligence to implement such plan to the best of its ability.

(B) Disapproval

If the Secretary of the Treasury does not approve a capital restoration plan as provided in subparagraph (A), then not later than the earlier of the date the Secretary of the Treasury disapproves of such plan by written notice to the Association or the expiration of the 30-day consideration period referred to in subparagraph (A) (as such period may have been extended by mutual agreement), the Secretary of the Treasury shall submit the Association's capital restoration plan, in the form most recently proposed to the Secretary of the Treasury by the Association, together with a report on the Secretary of the Treasury's reasons for disapproval of such plan and an alternative capital restoration plan, to the Chairman and ranking minority member of the Senate Committee on Labor and Human Resources and to the Chairman and ranking minority member of the House Committee on Education and Labor. A copy of such submission simultaneously shall be sent to the Association and the Secretary of Education by the Secretary of the Treasury.

(C) Association implementation and response

Upon receipt of the submission by the Association, the Association shall forthwith proceed with diligence to implement the most recently proposed capital restoration plan of the Association. The Association, within 30 days after receipt from the Secretary of the Treasury of such submission, shall submit to such Chairmen and ranking minority members a written response to such submission, setting out fully the nature and extent of the Association's agreement or

the disagreement with the Secretary of the Treasury with respect to the capital restoration plan submitted to the Secretary of the Treasury and any findings of the Secretary of the Treasury.

(6) Substantial capital ratio reduction

(A) Additional plan required

If the capital ratio is less than 1.75 percent and is greater than or equal to 1 percent at the end of the Association's most recent calendar quarter, the Association shall submit to the Secretary of the Treasury within 60 days after such occurrence a capital restoration plan (or an appropriate modification of any plan previously submitted or approved under paragraph (4)) to increase promptly its capital ratio to equal or exceed 1.75 percent. The Secretary of the Treasury and the Association shall consult with respect to any plan or modified plan submitted pursuant to this paragraph. The Secretary of the Treasury shall approve such plan or modified plan (or a modification thereof accepted by the Association) or disapprove such plan or modified plan within 30 days after such plan or modified plan is first submitted to the Secretary of the Treasury by the Association, unless the Association and Secretary of the Treasury mutually agree to a longer consideration period. If the Secretary of the Treasury approves a plan or modified plan (including a modification of a plan accepted by the Association), the Association shall forthwith proceed with diligence to implement such plan or modified plan to the best of the Association's ability.

(B) Disapproval

If the Secretary of the Treasury disapproves a capital restoration plan or modified plan submitted pursuant to subparagraph (A), then, not later than the earlier of the date the Secretary of the Treasury disapproves of such plan or modified plan (by written notice to the Association) or the expiration of the 30-day

consideration period described in subparagraph (A) (as such period may have been extended by mutual agreement), the Secretary of the Treasury shall prepare and submit an alternative capital restoration plan, together with a report on his reasons for disapproval of the Association's plan or modified plan, to the Chairman and ranking minority member of the Committee on Labor and Human Resources of the Senate and to the Chairman and ranking minority member of the Committee on Education and Labor of the House of Representatives. A copy of such submission simultaneously shall be sent to the Association and the Secretary of Education by the Secretary of the Treasury. The Association, within 5 days after receipt from the Secretary of the Treasury of such submission, shall submit to the Chairmen and ranking minority members of such Committees, and the Secretary of the Treasury, a written response to such submission, setting out fully the nature and extent of the Association's agreement or disagreement with the Secretary of the Treasury with respect to the disapproved plan and the alternative plan of the Secretary of the Treasury and any findings of the Secretary of the Treasury.

(C) Review by Congress; Association implementation

Congress shall have 60 legislative days after the date on which Congress receives the alternative plan under subparagraph (B) from the Secretary of the Treasury to review such plan. If Congress does not take statutory action with respect to any such plan within such 60-day period, the Association shall immediately proceed with diligence to implement the alternative capital restoration plan of the Secretary of the Treasury under subparagraph (B). If Congress is out of session when any such alternative plan is received, such 60-day period shall begin on the first day of the next session of Congress.

(7) Actions by Secretary of the Treasury

If the capital ratio of the Association does not equal or exceed 1.75 percent at the end of the Association's most recent calendar quarter, the Secretary of the Treasury may, until the capital ratio equals or exceeds 1.75 percent, take any one or more of the following actions:

(A) Limit increase in liabilities

Limit any increase in, or order the reduction of, any liabilities of the Association, except as necessary to fund student loan purchases and warehousing advances.

(B) Restrict growth

Restrict or eliminate growth of the Association's assets, other than student loans purchases and warehousing advances.

(C) Restrict distributions

Restrict the Association from making any capital distribution.

(D) Require issuance of new capital

Require the Association to issue new capital in any form and in any amount sufficient to restore at least a 1.75 percent capital ratio.

(E) Limit executive compensation

Prohibit the Association from increasing for any executive officer any compensation including bonuses at a rate exceeding that officer's average rate of compensation during the previous 12 calendar months and prohibiting the Board from adopting any new employment severance contracts.

(8) Critical capital standard

(A) If the capital ratio is less than 1 percent at the end of the Association's most recent calendar quarter and the Association has already submitted a capital restoration plan to the Secretary of the Treasury pursuant to paragraph (4) or (6)(A), the Association shall forthwith proceed with diligence to

implement the most recently proposed plan with such modifications as the Secretary of the Treasury determines are necessary to cause the capital ratio to equal or exceed 2 percent within 60 months.

(B) If the capital ratio is less than 1 percent at the end of the Association's most recent calendar quarter and the Association has not submitted a capital restoration plan to the Secretary of the Treasury pursuant to paragraph (4) or (6)(A), the Association shall—

(i) within 14 days of such occurrence submit a capital restoration plan to the Secretary of the Treasury which the Association believes is adequate to cause the capital ratio to equal or exceed 2 percent within 60 months; and

(ii) forthwith proceed with diligence to implement such plan with such modifications as the Secretary of the Treasury determines are necessary to cause the capital ratio to equal or exceed 2 percent within 60 months.

(C) Immediately upon a determination under subparagraph (A) or (B) to implement a capital restoration plan, the Secretary of the Treasury shall submit the capital restoration plan to be implemented to the Chairman and ranking minority member of the Committee on Labor and Human Resources of the Senate, the Chairman and ranking minority member of the Committee on Education and Labor of the House of Representatives, and the Secretary of Education.

(9) Additional reports to committees

The Association shall submit a copy of its capital restoration plan, modifications proposed to the Secretary of the Treasury, and proposed modifications received from the Secretary of the Treasury to the Congressional Budget Office and General Accounting

Office upon their submission to the Secretary of the Treasury or receipt from the Secretary of the Treasury. Notwithstanding any other provision of law, the Congressional Budget Office and General Accounting Office shall maintain the confidentiality of information received pursuant to the previous sentence. In the event that the Secretary of the Treasury does not approve a capital restoration plan as provided in paragraph (5)(A) or (6)(A), or in the event that a capital restoration plan is modified by the Secretary of the Treasury pursuant to paragraph (6)(B) or (8), the Congressional Budget Office and General Accounting Office shall each submit a report within 30 days of the Secretary of the Treasury's submission to the Chairmen and ranking minority members as required in paragraphs (5)(B), (6)(B), and (8)(C) to such Chairmen and ranking members—

(A) analyzing the financial condition of the Association;

(B) analyzing the capital restoration plan and reasons for disapproval of the plan contained in the Secretary of the Treasury's submission made pursuant to paragraph (5)(B), or the capital restoration plan proposed by the Association and the modifications made by the Secretary of the Treasury pursuant to paragraph (6)(B) or (8);

(C) analyzing the impact of the capital restoration plan and reasons for disapproval of the plan contained in the Secretary of the Treasury's submission made pursuant to paragraph (5)(B), or the impact of the capital restoration plan proposed by the Association and the modifications made by the Secretary of the Treasury pursuant to paragraph (6)(B) or (8), and analyzing the impact of the recommendations made pursuant to subparagraph (D) of this paragraph, on—

(i) the ability of the Association to fulfill its purpose and authorized activities as provided in this section, and

(ii) the operation of the student loan programs; and

(D) recommending steps which the Association should take to increase its capital ratio without impairing its ability to perform its purpose and authorized activities as provided in this section.

(10) Review by Secretary of Education

The Secretary of Education shall review the Secretary of the Treasury's submission required pursuant to paragraph (5)(B), (6)(B), or (8) and shall submit a report within 30 days to the Chairman and ranking minority member of the Senate Committee on Labor and Human Resources and to the Chairman and ranking minority member of the House Committee on Education and Labor—

(A) describing any administrative or legislative provisions governing the student loan programs which contributed to the decline in the Association's capital ratio; and

(B) recommending administrative and legislative changes in the student loan programs to maintain the orderly operation of such programs and to enable the Association to fulfill its purpose and authorized activities consistent with the capital ratio specified in paragraph (4).

(11) Safe harbor

The Association shall be deemed in compliance with the capital ratios described in paragraphs (4) and (6)(A) if the Association is rated in 1 of the 2 highest full rating categories (such categories to be determined without regard to designations within categories) by 2 nationally recognized statistical rating

organizations, determined without regard to the Association status as a federally chartered corporation.

(12) Treatment of confidential information

Notwithstanding any other provision of law, the Secretary of the Treasury, the Secretary of Education, the Congressional Budget Office, and the General Accounting Office shall not disclose any information treated as confidential by the Association and obtained pursuant to this subsection. Nothing in this paragraph shall authorize the Secretary of the Treasury, the Secretary of Education, the Congressional Budget Office, and the General Accounting Office to withhold information from Congress, or prevent the Secretary of Education, the Congressional Budget office, and the General Accounting Office from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States. For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3) of such section 552.

(13) Definitions

As used in this subsection:

(A) The term "nationally recognized statistical rating organization" means any entity recognized as such by the Securities and Exchange Commission.

(B) The term "capital ratio" means the ratio of total stockholders' equity, as shown on the Association's most recent quarterly consolidated balance sheet prepared in the ordinary course of its business, to the sum of—

(i) the total assets of the Association, as shown on the balance sheet prepared in the ordinary course of its business; and

(ii) 50 percent of the credit equivalent amount of the following off-balance sheet items of the Association as of the date of such balance sheet—

(I) all financial standby letters of credit and other irrevocable guarantees of the repayment of financial obligations of others; and

(II) all interest rate contracts and exchange rate contracts, including interest exchange agreements, floor, cap, and collar agreements and similar arrangements.

For purposes of this subparagraph, the calculation of the credit equivalent amount of the items set forth in clause (ii) of this subparagraph, the netting of such items and eliminations for the purpose of avoidance of double-counting of such items shall be made in accordance with the measures for computing credit conversion factors for off-balance sheet items for capital maintenance purposes established for commercial banks from time to time by the Federal Reserve Board, but without regard to any risk weighting provisions in such measures.

(C) The term "legislative days" means only days on which either House of Congress is in session.